IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1767

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, National Society of Professional Engineers ("NSPE"), requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 14, 1977.

OPINIONS BELOW

The opinion of the Circuit Court (per Judges Wright, Tamm and Leventhal) from which this Petition is taken is not yet reported. It appears in the Appendix hereto at A-2.[1] The first District Court opin-

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[1] Citations to the Appendix hereto are in the above form. The Joint Appendix in the Court of Appeals is cited as "J.A."

ion herein, dated December 19, 1974, is reported at 389 F. Supp. 1193. The District Court entered judgment on December 31, 1974, from which direct appeal to this Court was taken. On June 23, 1975, this Court, as reported at 422 U.S. 1031, unanimously vacated the District Court judgment, awarded costs to NSPE, and remanded for further consideration in light of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). On November 26, 1975, the District Court reinstated its judgment without modification. A-15-A-20. The second District Court opinion, of that date, is reported at 404 F. Supp. 457. On December 4, 1975, the District Court denied NSPE's application under 15 U.S.C. § 29 for permission to appeal directly to this Court. A-14. The Circuit Court affirmed the District Court judgment except to the extent the Circuit Court held NSPE's First Amendment rights were infringed thereby.

JURISDICTION

The Court of Appeals judgment was entered on March 14, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the rule of reason applies in an antitrust attack on professional ethics governing the solicitation of work by bidding.

2. Whether a provision of a profession's code of ethics which states the same policy against fee bidding for professional services as the policy stated in United States statutes and regulations, and state statutes, regulations and judicial decisions, is reasonable and thus not illegal under Sherman Act Section 1.

3. Whether the judgment herein, prohibiting Petitioner from stating views or advocating a policy Petitioner believes essential to public safety, abridges Petitioner's First Amendment rights.

4. Whether this Court's mandate herein required the District Court to consider the record evidence regarding the reasonableness of the ethical rule at issue.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment, Sherman Act § 1 (15 U.S.C. § 1) and the Brooks Act (40 U.S.C. §§ 541-44) (Supp. II, 1972) are principally involved. Numerous other United States and state statutes and regulations prescribe the same policy against obtaining professional engineering work by fee bidding as that set forth in the Brooks Act and in Petitioner's Code of Ethics. The statutes involved appear at A-21-A-50.

STATEMENT OF THE CASE

Respondent seeks to enjoin Petitioner, NSPE, from promulgating Section 11(c) of its Code of Ethics or advocating the policy stated therein. The NSPE Code of Ethics appears at A-50-A-59.

This antitrust case, which has been pending since 1972, has generated opinions, orders and mandates from the District and Circuit Courts and this Court. However, to date, notwithstanding Petitioner's efforts, no court has considered—indeed, the District and Circuit courts expressly rejected consideration of—the evidence relating to the reasonableness of the ethical provision.[2] The District and Circuit courts construed the law to prohibit consideration of that evidence.[3]

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[2] 389 F. Supp. at 1199; A-8.

Petitioner is a non-profit national professional society with more than 70,000 members located throughout the United States.[4] It defended this case to obtain a definitive ruling on the merits of the long-standing ethical canon, confident that consideration of the facts would vindicate the profession and protect the public. To date, that objective has been frustrated by the unprecedented application herein of the *per se* rubric to professional ethics. The merits of the ethical rule in the context of engineering practice have not been addressed by any court in this case.

The ethical principle at issue—holding it improper for engineers to solicit work by fee bidding—dates back at least to 1911[5] and can be understood only in the unique context of engineering practice. Engineering is the profession whose practitioners apply science to solve technological problems for human welfare.[6] Arriving at the tentative conceptual solution to an engineering problem is an extremely complex matter, requiring judgmental choices among innumerable alternative decisions, approaches and techniques.[7] Determination of those choices is dependent on extensive client-engineer consultation.[8] The variety and complexity of those choices are such that before he consults extensively with his prospective client, and makes an engineering analysis, it is impossible for an engineer to specify or his client to know what engineering services are to be rendered.[9] This is true, as the evidence shows, with regard to each prospective assignment involving design of an office building, a school, a nuclear power plant, a sewage system, a bridge, a hospital or any other structure affecting public safety.[10] In each such case, one sixth to one third of the engineering work required is involved in identifying the problem, analyzing it preliminarily and proposing a tentative conceptual solution.[11] The tentative conceptual solution discloses for the first time the nature, scope and complexity of, and the proposed approach to, the assignment.[12] The ethical provision at issue says that the engineer cannot ethically fee bid before he has done that initial work in consultation with the prospective client—before the engineer can possibly know what he is bidding on.[13]

Abolition of the ethical prohibition against soliciting engineering work by bidding would endanger the pub-

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[3] *Id.*

[4] J.A. 9944.

[5] By 1911, the American Institute of Consulting Engineers is known to have had the following provision among its stated ethics:

> To compete with a fellow Engineer for employment on the basis of professional charges, by reducing his usual charges and attempting to underbid after being informed of the charges named by his competitor [is unethical]. E. Heermance, Codes of Ethics 166 (1924).

This principle was incorporated in NSPE's Code of Ethics when the Code was adopted in 1964. J.A. 9951.

For a discussion of early codes of ethics in the engineering profession *see* The Annals of the American Academy of Political and Social Science 68-104 (May, 1922).

[6] J.A. 1098.

[7] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[8] *Id.*

[9] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

[10] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[11] J.A. 1153, 1627-28.

[12] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[13] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

lic.[14] To understand why this is so, solicitation of an engineering assignment must be compared with solicitation of work in other fields. The evidence on this subject was explicitly disregarded by both lower courts.[15]

As used in occupations other than in engineering, "competitive bidding" means selection of a buyer or seller of a specified product or service on the basis of price proposals, and "requires that all bidders be placed on a plane of equality, and that they bid on the same terms and conditions." [16] One example of competitive bidding is an auction, where a specified article is sold to the highest bidder.[17] Competitive bidding is also often used in securing commercial goods and services, as in the construction industry where engineered plans and specifications state the services and goods the contractor is to supply, and amounts bid by contractors are, accordingly, comparable.[18]

In engineering the term "competitive bidding" has the diametrically opposite meaning. In engineering, "competitive bidding" means the solicitation of work by submission of a quoted fee before the engineer has had an opportunity to study or specify the problem involved, to determine a possible solution, or to ascertain the engineering work required to produce the design that will solve the client's problem.[19]

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[14] J.A. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[15] 389 F.Supp. at 1199; A-8.

[16] Black's Law Dictionary 356 (4th ed. 1968).

[17] J.A. 2334.

[18] J.A. 377-78, 1226-28, 1466, 1638, 2334, 3349.

[19] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

When an engineer solicits work by bidding a fee, neither he nor his client has specifications to go by.[20] Two engineers bidding to be retained prior to initial analysis and consultation with the prospective client are thus bidding to provide services which are undefined and which cannot be comparable. Instead of bidding "on the same terms and conditions" they are engaging in a lottery, since "competitive bids" in these circumstances can only be guesses.[21] There is no basis for comparison of engineers' fee bids because the client cannot determine the nature or amount of engineering work represented by different bids.[22]

Fee bids by engineers, in addition to being not comparable, misleading to the client, a form of bait-and-switch deception, false advertising, and a sham, jeopardize public safety.[23] This jeopardy is pervasive. The work of engineers affects every aspect of public safety and health. From the supply of water treatment systems, through the operation of intensive care units, and to the safety of classrooms, highways, hotels, airports, and other places of public congregation, public safety and health are dependent on highly competent and safe engineering design.[24]

Engineers who, contrary to their profession's ethics, solicit work by fee bidding desire to secure the work,

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[20] *Id.*

[21] *Id.*

[22] J.A. 410-12, 513-14, 1221-22, 1639, 1999, 3384-85.

[23] J.A. 48, 176-79, 262-65, 962-64, 1036-37, 1044-46, 1230, 1252, 1284-86, 1634-35, 1705, 2003-05, 2012-15, 3348-49, 3379.

[24] J.A. 43, 106-07, 130-32, 167, 357-38, 364-66, 680-85, 950-51, 27-28, 1031-40, 1046-47, 1104-05, 1150-52, 1219, 1230, 1252-56, 281, 12[illegible] 1734-35, 1780-82, 1984-89, 3389.

and therefore bid as low as possible.[25] Consequently the submission of a fee bid, before the design problem can be analyzed, limits the amount and quality of analysis ultimately applied to the problem.[26] The effort in such cases is to produce the cheapest design acceptable to the client.[27] The quality of the design is inexorably subordinated to the amount of the previously submitted bid.[28] Fee bidding in engineering results—and has resulted when perpetrated in the past—in unsafe design, injury and the loss of life.[29]

The record evidence on this point is uncontroverted. There is a demonstrated relationship between claims of negligent engineering work and bidding and fee cutting in the solicitation of engineering work.[30] In a recent seven-year period there were 17,500 such claims, with death or bodily injury involved in 15 percent of them.[31] This averages approximately 2,500 claims per year, with an average of one claim every day involving death or personal injury. The insurance carrier which provided liability insurance to sixty or seventy percent of the professional engineers in the country, and recorded and analyzed claims of inadequate engineering work, presented undisputed evidence that the

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[25] J.A. 375-76, 868, 1151-52, 1325, 1634-35, 3348-49, 3380.

[26] J.A. 178, 374-78, 838, 1469, 1634-36, 1647, 1657, 1931, 2005.

[27] *Id.*

[28] *Id.*

[29] J.A. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[30] J.A. 1009-10.

[31] J.A. 991-98.

solicitation of engineering assignments by fee bidding materially increases the risk of unsafe engineering.[32]

Fee bidding for professional engineering work also results in higher construction and life-cycle costs;[33] frustrates competition in the construction of the designed structure, by subjecting contractors to inadequately developed engineering designs, thus preventing meaningful comparison of construction bids;[34] precludes the mutual trust indispensable to the client-professional relationship;[35] and reduces engineers to the standards of commercial rivalry characteristic of the marketplace.[36] In sum, fee bidding is irreconcilable with competent engineering.

The District Court made no findings on any of the foregoing evidence, holding that it "need not consider" the evidence because the *per se* rule applies.[37]

The appropriate and ethical method of retaining an engineer is essentially the same as the traditional method of retaining a lawyer or consulting a physician. The prospective client identifies one, two, three, four or more engineers or engineering firms, interviews them, obtains their qualifications, determines their backgrounds, and tentatively selects the one who, in the client's judgment, is best qualified and most suit-

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[32] J.A. 1009-10.

[33] J.A. 175, 178-80, 380-81, 516, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[34] J.A. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

[35] J.A. 383-84, 692, 694-95, 1455-56, 1506-07, 1645-46, 1999-2005.

[36] J.A. 718-19, 837-38, 969, 1506-07, 1673, 1999-2001, 2325-26.

[37] 389 F.Supp. at 1199.

able.[38] Thereafter, the client and the tentatively selected professional discuss and preliminarily analyze the problem.[39] A tentative approach is determined.[40] *Then* they discuss the proposed fee.[41] Should they for any reason not agree on a fee, the client is free to approach another practitioner.[42]

The ethical prohibition against soliciting professional engineering work by bidding applies *only* to work which immediately affects public safety.[43] For example, study contracts which involve providing a specified amount of work and reporting the result, and which do not involve engineering design that may endanger the public, may ethically be awarded on the basis of bidding.[44] Research and development work, which does not immediately affect public safety, is likewise outside the ethical rule's scope.[45] Other excluded areas were also cited in the record.[46] Identification of the situations in which public safety is at risk, and of the professional standards that must be followed to provide a safe result, is peculiarly a matter for professional judgment.[47] Ethical principles have been devel-

[38] J.A. 9970 (Finding No. 45).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] J.A. 1788-90, 2549-50, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2805.

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, J.A. 1788, 2551.

[47] J.A. 353-58, 596, 617-19, 954-55, 1220, 1255, 1443-46, 1460, 1463, 1981-82, 2007-08; Defendant's Exhibit ("DX") 1 at 3.

oped over several generations to protect the public against unsafe engineering.

Statutes, regulations and judicial decisions in more than 30 states—virtually every state which has acted on the subject—prohibit fee bidding as a method of obtaining engineering services. In 14 additional states, where there is no clear official pronouncement, it appears to be against state policy. At least 49 state court decisions—every decision on the subject known to counsel—from courts in states throughout the United States, declare fee bidding an improper method of obtaining professional services. These authorities are cited in the record, as are the legislative histories and texts of the many United States statutes and regulations which also prohibit the practice prohibited by Section 11(c) of Petitioner's Code of Ethics. *See* A-21-A-50; A-60-A-62.

CIRCUIT COURT HOLDINGS

The unusual posture in which this case came to the Circuit Court, whereby the record evidence respecting the ethical rule's reasonableness had been expressly disregarded by the District Court, resulted in fundamental errors and misconceptions in the Circuit Court opinion. The Circuit Court opinion, like the District Court's, omits analysis of that evidence. It also omits, as did the District Court, reference to the United States and state laws which dictate the same policy as that contained in the ethical rule. While holding that the District Court's findings of fact "were not clearly erroneous," [48] the Circuit Court neglected to state that

[48] A-5.

the District Court made no findings on the issue of reasonableness, but essentially found only that engineering practice substantially affects interstate commerce, a proposition Petitioner does not contest. The Circuit Court, like the District Court, omitted consideration of the testimony, most of it uncontroverted, of the seventeen expert witnesses called by Petitioner. Directly contrary to NSPE's Board of Ethical Review opinions to which it made no reference, the Circuit Court incorrectly stated that the ethical rule has "universal sweep." [49] The documentary evidence, to the contrary, establishes that the rule has been scrupulously limited to cover only engineering work which immediately affects public safety.[50]

Having wrongly concluded with respect to the breadth of Petitioner's ethical rule that it reaches all engineering work, and having made no analysis of the reasons for or evidence supporting the rule, the Circuit Court proceeded to hold that "the rationalization offered by the Society does not justify the broad ban on all competitive bidding. . . ." [51] The Circuit Court did not explain how it could so hold while rejecting consideration of Petitioner's so-called "rationalization" for the ethical rule.

Similarly, while giving lip service to what it described as the "legitimate objective of preventing deceptively low bids," [52] the Circuit Court rejected coun-

[49] A-7.

[50] J.A. 1788-90, 2549-50, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2805.

[51] A-9.

[52] A-10.

sel's offer to reformulate the ethical rule to remove any ambiguity or doubt that its only purpose is to protect public safety.[53]

In upholding application of the *per se* doctrine to this case, the Circuit Court stated that the rule of reason might apply to "ethical rules of professional associations narrowly confined to interdiction of abuses," [54] but rejected application of the rule of reason here, asserting that Petitioner's ethical rule "governs situations where there are no such dangers." [55] The Court made no attempt to reconcile that holding with its refusal to consider the evidence of those dangers. The Circuit Court suggested that Petitioner "may move the district court for modification of the decree" in light of a revised ethical canon,[56] but it did not state that such a revision should be considered under the rule of reason, nor did it intimate why reformulation of the ethical canon would bring a different antitrust standard into operation, if it would.

The Circuit Court also rejected Petitioner's contention that this Court's mandate required the District Court to consider the evidence.[57]

In one respect, the Circuit Court reversed the District Court judgment. The Circuit Court struck down, as violating the First Amendment, that portion of the judgment which required Petitioner to state affirmatively that it does not consider fee bidding in engineer-

[53] A-10.

[54] A-11-A-12.

[55] A-12.

[56] A-10.

[57] A-8.

ing to be unethical.[58] However, the Circuit Court did not address Petitioner's argument that the judgment pervasively abridges First Amendment rights.[59] The Circuit Court did not advert to Petitioner's argument that the judgment, to the extent it requires Petitioner to cease publication of its ethical beliefs, is an unconstitutional prior restraint.[60] Nor did the Circuit Court address Petitioner's contention that the judgment abridges First Amendment associational rights.[61] While the precise scope of the Circuit Court's modification of the judgment is subject to argument in District Court proceedings on remand, it is evident that the Circuit Court did not grant Petitioner the full constitutional relief it sought.

REASONS FOR GRANTING THE WRIT

1. Application of the *per se* Standard Herein to Professional Ethics is Contrary to This Court's Decisions, and Erases the Historic Distinction Between Solicitation of Work by Professionals and Solicitation of Work by Merchants.

Application of the *per se* doctrine to professional ethics, and particularly to professional ethics regarding solicitation, as involved here, is inconsistent with the Court's statements of that doctrine. Section 1 of the Sherman Act prohibits restraints of trade which are unreasonable. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911). To be *per se* unreasonable, restraints of trade must have a "pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific Ry.* v. *United States,* [illegible] U.S.

[58] A-12-A-13.

[59] Brief for Appellant in the Court of Appeals at 38-41.

[60] *Id.* at 38-39.

[61] *Id.* at 39-40.

1, 5 (1958). The rule of *per se* was not intended to prohibit activities which are reasonable and ethical, but only those so "pernicious" that the administration of justice would be ill served by an effort to justify them. As the Court stated in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.
>
> * * * *
>
> . . . the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

With the exception of the lower courts in this case, no court has ever applied the *per se* doctrine to the ethics of a learned profession. Such a holding, which rejects consideration of the factual context, purposes and effects of the ethics, is inconsistent with *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963), which requires the courts to consider "the actual impact," "the economic and business stuff," of the offense alleged, to decide whether the conduct attacked has "a pernicious effect" and "lack [of] any redeeming virtue." *See also Maple Flooring Mfrs. Assn.* v. *United States,* 268 U.S. 563, 579 (1925); *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933); *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 555-56 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the Court held a lawyers' minimum fee schedule unlawful, but the Court conspicuously did not apply the *per se rule.* The Court stated that

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. 421 U.S. at 787 n. 17.

Petitioners in *Goldfarb* made no showing that the fee schedule was required for the protection of the public or for any other legitimate reason. NSPE neither maintains nor defends any fee schedule. In *Goldfarb,* petitioners contended that the Sherman Act did not apply to the practice of law. This Court held otherwise. NSPE does not seek reversal of any aspect of that case.

In the instant case a massive showing was made that the ethical principle at issue is needed for the competent and safe practice of engineering, and is in the public interest. The lower courts refused to consider that evidence. That such evidence was presented in this case rebuts the often-heard canard that application of the rule of reason in such a case would bog down the administration of justice. It is the lower

courts' refusal to consider the evidence of reasonableness, and not Petitioner's presentation of that evidence, that has protracted this case. The evidentiary record here demonstrates that it is entirely feasible for courts to determine the reasonableness of professional ethics. Application of the *per se* rule in this case elevates expedience over justice and the public interest.

The relation of an ethical canon's scope to the evil which the canon seeks to root out is an appropriate consideration for the courts in determining whether the canon is reasonable. However, that comparison can be made rationally only if the court examines the evil at which the canon is aimed, in the context of the professional practices involved. This the lower courts refused to do.

The lower courts' refusal to consider the evidence is all the more egregious in light of prevailing laws and legislative history on point, which the lower courts ignored. Statutes, regulations and judicial decisions specifying a course of conduct establish a standard of reasonableness as a matter of law. *Martin* v. *Herzog,* 228 N.Y. 164, 126 N.E. 814 (1920) (Cardozo, J.); O. Holmes, *The Common Law,* 89-90 (Howe ed., 1967); W. Prosser, *Law of Torts,* 188-204 (1971). State and federal laws are legion which hold fee bidding a forbidden and unreasonable method of obtaining engineering services. *See* A-21-A-50; A-60-A-62. Petitioner does not contend that these laws comprise an exemption from the Sherman Act. Rather, Petitioner contends that they are evidence of and establish the reasonableness of Section 11(c). *See Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204, 210 (1946).

Federal policy on the subject of this case dates from 1925, when, in taking the then-novel step of retaining

outside professional engineers, Congress authorized retainer agreements "without reference to civil service requirements," Pub. L. No. 68-463 (February 24, 1925), and "in accordance with the usual customs of their several professions," Pub. L. No. 69-141 (April 22, 1926).

In 1939, S. Rep. No. 263, 76th Cong., 1st Sess., stated,

> It is desired to eliminate advertising for engineering and architectural services, as required by Section 3709 of the Revised Statutes . . . . because responding to advertising for professional services of this character is considered to be unethical.
>
> Furthermore, it is as illogical to advertise for services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist . . . . The question in each case should be decided upon the special qualifications of the firms under consideration. *Id.* at 23.

The foregoing Report resulted in enactment of 10 U.S.C. § 7212, and is illustrative of a long line of Congressional declarations on this subject. In its Report on one such statute, the Brooks Act (40 U.S.C. §§ 541-44) (Supp. II, 1972), the House Committee on Government Operations found as follows:

> [T]he committee concludes that the traditional system of architectural and engineering service procurement utilized by the Federal Government, as well as other public bodies, business and private industry, constitutes the most effective and efficient manner to acquire these professional services, and that regular competitive negotiation procedures not be applied to A/E [architect/engineer] procurement. H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 2 (1972).

> . . . . regular competitive negotiation, where each potential contractor is pitted against the others in terms of fee and quality of his product or service, does not provide an optimum method of procuring A/E services for the Government, or anyone else. Even were A/E fees reduced somewhat, the 'savings' would inevitably be reflected in a reduction in the A/E's design costs rather than his projected margin of profit. This in turn means that the Government would tend to obtain lower quality plans and specifications which could mean high construction and maintenance costs and, generally, lower quality buildings and other facilities. *Id.* at 4.

The Senate Committee on Government Operations found that:

> The procurement of architectural and engineering services has traditionally been recognized as presenting unique considerations. Like the medical and legal professions, the architectural and engineering professions demand abundant learning, skill, and integrity, requiring a broad spectrum of capabilities that for the best results must be closely matched with the needs and requirements of those who contract for them. S. Rep. No. 92-1219, 92d Cong., 2d Sess. 4 (1972).
>
> The enactment of H.R. 12807 [the Brooks Bill] would insure the continuation of the Government's basic procurement procedure, with respect to architectural and engineering services, which has been in operation for more than 30 years. It is also the traditional system of procurement for similar services utilized by State and local governments. *Id.* at 6.

These are only a few of the findings of Congress which, like the federal agencies' and departments' comparable findings, bear on the issue of reasonable-

ness in this case. United States policy, declared in all of the statutes and regulations on point, is the same as the policy stated in Petitioner's Code.

These Congressional determinations are obviously relevant. Petitioner contends they are reasonable as a matter of law. Under their exclusionary *per se* decision of the case, the lower courts took no notice of Congress' findings, or of the state laws and decisions on point.

Limitations on methods of solicitation of work are a hallmark of the professions.[62] The value of limiting solicitation by professionals in socially proper ways has stood the test of time. If the *per se* judgment in this case is upheld, those limitations will be mechanically eradicated. The highest court should act before such a drastic change in social policy is made.

2. Application of the *per se* Standard in This Case Conflicts With the Law of Other Circuits.

Petitioner's members, who are directly affected by the judgment herein, reside in every state of the United States. Had this case been brought in another circuit the rule of reason would have been applied, consistent with recently announced law of the other circuits. Review of this case by the Court is necessary to harmonize the law of the circuit courts on point.

In *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1190-93 (1976), the Third Circuit applied the rule of reason, rejecting the *per se* standard, to a licensee's antitrust claim against a discount department store. The court's grounds for so holding were that the business relation-

[62] J.A. 1446-48, 1456-57, 1462, 1502-03, 5478-79; DX 40, pages 213, 214; DX 211; DX 212.

ship between the two was not "one with which the courts have had 'considerable experience'" and the challenged restrictions were not "naked restraints with no purpose except [the] stifling of competition." *Id.* at 1191.

In *Mackey* v. *National Football League,* 543 F.2d 606, 618-20 (1976), the Eighth Circuit held that the rule of reason, not *per se,* applies to the "Rozelle Rule", a group boycott practice governing employment of football players. "[W]e conclude", said the court, "that the unique nature of professional football renders it inappropriate to mechanically apply *per se* illegality rules here, fashioned in a different context." *Id.* at 619. *See also Quality Mercury, Inc.* v. *Ford Motor Co.,* 542 F.2d 466 (8th Cir. 1976).

In *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.,* 549 F.2d 368, 379-80 (1977), the Fifth Circuit held that the rule of reason, not the *per se* rule, applies to approved-source requirements of franchisors. Noting that such tying arrangements had often been held *per se* illegal, the court declined to apply that standard, holding that "Here, as elsewhere, the *per se* label can sometimes prove misleading." *Id.* at 375. The Fifth Circuit likewise applied the rule of reason to a quarter-horse association's group boycott of a colt with "excessive white markings." *Hatley* v. *American Quarter Horse Assn.,* 1977-1 Trade Cases ¶ 61,441 (1977). *See also Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976).

Likewise, the Seventh Circuit rejected the *per se* rule, and applied the rule of reason, in *Moraine Products* v. *ICI America, Inc.,* 538 F.2d 134, *cert. denied,* 97 S.Ct. 357 (1976), involving an antitrust claim, re-

specting mutual exclusive patent licenses, made by a patent assignee. To apply *per se* in such a case, the court held, "would draw a line differentiating legal and illegal practices upon a presumption not fairly drawn from the factual realities . . . ." *Id.* at 145.

The foregoing cases by no means exhaust the recent authorities in other circuits applying the rule of reason to antitrust questions far less novel and important than presented here. Unless the Court reviews this case, the outcome of Sherman Act Section 1 cases involving professional ethics will depend on the circuit in which the case is brought; and where, as here, national associations are involved, forum shopping is likely to be rewarded in such cases.

3. The Judgment in This Case Jeopardizes Public Safety.

The risks to the public of the practice at which Petitioner's ethical rule is aimed are set forth in the Statement of the Case, *supra*. The record shows that these risks are grave and pervasive. Courts are accustomed to statements by litigants of horrible consequences, and courts are entitled to be skeptical. However, the lower courts in this case were not skeptical; rather they chose simply not to consider the evidence, concluding that the *per se* rule made the evidence superfluous. Petitioner seeks to have the facts considered and weighed, which can be done only under the rule of reason.

4. The Judgment in This Case Abridges Petitioner's First Amendment Rights by Prohibiting It From Stating Views or Advocating a Policy It Believes Essential to Public Safety.

A. The judgment unconstitutionally enjoins speech.

The judgment herein[63] abridges First Amendment rights by prohibiting Petitioner and its officers and members from stating or advocating a view they consider essential to public safety and welfare. The District Court adopted as its judgment a sweeping eight-page order which recited verbatim every provision requested by Respondent, and nothing else. It cannot be doubted that the judgment in this case enjoins speech. Paragraph VII, for example, provides:

> *The defendant is enjoined and restrained from adopting or disseminating* in *any* of its publications or otherwise, any Code of Ethics, opinion of its Board of Ethical Review, policy *statement*, rule, by-law, resolution or guideline . . . which states or *implies* that the submission of price quotations for engineering services or *that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.* (Emphasis added.)

There is a very strong presumption against the constitutional validity of any such prior restraint on expression. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *Near* v. *Minnesota,* 283 U.S. 697 (1931). In *New York Times Co.* v. *United States,* this Court, in the face of claims that the very security of the nation was imperiled by the publication

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[63] A-15-A-20.

sought to be enjoined, held that such an injunction was inconsistent with the First Amendment's fundamental guarantee of freedom of expression.

In *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976), the Court stated that the First Amendment protects the right to advocate professional restrictions even though the restrictions advocated are illegal.

The exceedingly broad restraints on expression imposed by the judgment cannot be justified as necessary to prevent violations of the Sherman Act, even assuming the judgment were otherwise upheld. The Court held in *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), that the Sherman Act cannot be applied to prohibit an organization from advocating a public position, since to do so would deprive the government of a valuable source of information and abridge the right of petition. *See also United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). Affirmative undertakings by Petitioner compelled by the judgment, even as modified by the Circuit Court, would unconstitutionally require Petitioner to use its publications as a "billboard" for views it considers obnoxious. *Wooley* v. *Maynard*, —— U.S. ——, 45 U.S.L.W. 4379 (April 20, 1977); *see* A-17-A-18. Even commercial implications of speech do not justify "narrowing the protection of expression secured by the First Amendment". *Bigelow* v. *Virginia*, 421 U.S. 809, 818 (1975). The judgment in this case unconstitutionally enjoins Petitioner and its officers and members from advocating a policy they consider essential to public safety.

B. The judgment abridges the right to free association.

Additionally, the judgment in this case blatantly abridges the First Amendment right of association. Senator Sherman, in advocating the legislation on which the judgment purports to be based, said that the Sherman Act

> . . . does not interfere in the slightest degree with voluntary associations made to affect public opinion. 21 Cong. Rec. 3.2557 (March 24, 1890).

Cf. H. Thorelli, *The Federal Antitrust Policy* 164ff. (1955). The judgment, however, prohibits Petitioner's members from associating to advance their belief that certain forms of conduct in their profession are unethical. As the Court stated in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958),

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .

See also NAACP v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (a group boycott, even if it violates a valid law, may not constitutionally be the basis for an injunction against the right to associate to advocate ideas).

5. This Court's Mandate Herein Required the District Court to Consider the Evidence of the Ethical Rule's Reasonableness. The Circuit Court Erred in Affirming the District Court's Refusal To Do So.

Contrary to the lower courts' view, Petitioner contends that this Court's vacation of the District Court judgment and remand for reconsideration in light of *Goldfarb* v. *Virginia State Bar, supra,* was not a meaningless formality. This is only the second antitrust case decided summarily by this Court since 1965 in which such a mandate has issued. The other, *United States* v. *Continental Oil Co.,* 387 U.S. 424 (1967), arose under Clayton Act § 7. There the Court, on a direct appeal, summarily vacated a district court judgment and remanded for reconsideration in light of *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966). On reconsideration, the district court in *Continental Oil* reversed itself. 1968 Trade Cases ¶ 72,374 (D.N.M.). On the second direct appeal, this Court summarily affirmed. 393 U.S. 79 (1968).

The Court has stated that vacation of a judgment with instructions to reconsider in light of an intervening precedent is tantamount to reversal. In *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963), the Court vacated a South Carolina Supreme Court judgment and remanded for reconsideration in light of *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). On remand, the South Carolina court reaffirmed itself, notwithstanding this Court's action. Appeal was taken, and this Court reversed. 376 U.S. 776 (1964). Explaining the significance of its vacation of judgment and reversal of the lower court's second decision, the Court stated:

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration. . . . The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case. 376 U.S. at 776-77 (footnote omitted).

Thus, the lower courts' view, that this Court's mandate was a mere technicality, is unsupportable.

Petitioner believes the Court intended that the District Court should not slavishly adopt as the *ratio decidendi* of this case a theory, *per se,* never before applied to professional ethics. Petitioner believes the Court intended that the District Court should take legal cognizance of the evidence regarding the dangers of fee bidding in engineering, to the end that the District Court could determine whether "features of [that] profession . . . require that [this] particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb, supra,* 421 U.S. at 788 n. 17. That is the standard *Goldfarb* makes applicable here.

As the Court stated in *Goldfarb,* 421 U.S. at 792, "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession" (quoting *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 336 (1952)). In *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612 (1935), the Court said this:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but

> protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises . . . . And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

Petitioner believes that this Court recognized that there is no way to do justice in this case without considering the facts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 10, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1767

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1023

UNITED STATES OF AMERICA

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Appellant

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 2412-72)

Argued January 18, 1977

Decided March 14, 1977

Lee Loevinger, with whom *Martin Michaelson, James H. Sneed* and *Janet L. McDavid* were on the brief, for appellant.

Robert B. Nicholson, Attorney, Department of Justice, with whom *Susan J. Atkinson*, Attorney, Department of Justice was on the brief, for appellee. *Laurence K. Gustafson*, Attorney, Department of Justice also entered an appearance for appellee.

Before: WRIGHT, TAMM and LEVENTHAL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge:* The U.S. Department of Justice presses this antitrust suit against the 65,000 member National Society of Professional Engineers. It claims that the Society's efforts to enforce Section 11(c) of its

Code of Ethics, which prohibits any form of competitive bidding on engineering projects,[1] violate Section 1 of the Sherman Act.

After extensive discovery and a trial, the district court found that the Society's actions had the requisite impact on interstate commerce, that the engineering profession was not entitled to an exemption from the antitrust laws, and that the Society's prohibition of competitive bidding, as a form of price-fixing, was a *per se* violation of the Sherman Act. The District Court's extensive findings of fact and conclusions of law are set out at 389 F.Supp. 1193.

That ruling was appealed directly to the Supreme Court under the then applicable statute.[2] No action was

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[1] Section 11(c) of the Code provides:

> Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, . . .
>
> • • • •
>
> c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals (F. 26, 389 F. Supp. at 1205).

[2] 15 U.S.C. § 29 (1970). The Statute was amended on December

taken, however, until one week after the Supreme Court's decision in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), when the Court vacated and remanded the district court's ruling for reconsideration in light of *Goldfarb*. 422 U.S. 1031 (1975). After reargument, the district court issued a second opinion, reported at 404 F.Supp. 457. The district court viewed the *Goldfarb* decision, which held unlawful minimum fee schedules for legal services, as supportive of its original determination of illegality, and therefore reaffirmed its earlier findings and conclusions. The district court then entered judgment enjoining the defendant from adopting any rule or policy statement which in any way prohibits or discourages the submission of price quotations or states or implies that price competition is unethical and further ordered the defendant "to state in any publication of its Code of Ethics that the submission of price quotations for engineering services at any time and in any amount is not considered an unethical practice."

On appeal, defendant contends, *inter alia,* that the Supreme Court's opinion in *Goldfarb* leaves room for restraints on competition among professionals where those restraints serve a reasonable objective, and that the prohibition on price competition among consulting engineers is justified by the peculiar nature of the services they provide. In particular, defendant argues that the impossibility of formulating precise specifications for many engineering tasks requires that engineers engage in extensive consultation and planning with the purchaser before making a price estimate. Evils are inherent, it is said, in estimates that can only be guesses. An engineer who is forced to bid competitively on the basis of a buyer's general requirements will be under pressure that will tend to encourage optimism and mistake, and

21, 1974 to provide for initial review in the courts of appeals in most cases. 15 U.S.C. 329(a) (Supp. V 1975).

possibly cunning, all thrusting him toward an unreasonably low bid. Later, in order to avoid disastrous losses, the engineer may try to pressure the purchaser into renegotiating the contract or, failing that, may cut corners, to the disadvantage of the client and in all likelihood the public. In sum, defendant argues that a ban on competitive bidding is necessary to prevent deception and poor execution. Defendant also challenges the relief granted by the district court as overbroad and violative of defendant's First Amendment rights.

A.

We hold that the district court's findings of fact were not clearly erroneous. We affirm and approve the district court's ultimate conclusion of law. We are in agreement with most of the legal reasoning of the district court, and have identified critical passages in the margin.[3]

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[3] Section 11(c) prohibits defendant's members from engaging in any form of price competition when offering their services; selection is restricted to considerations of reputation and ability. No fee information may be given a prospective client which takes the form of cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost which can be compared to that of another engineer. Section 11(c), however, does permit members to disclose recommended state society fee schedules to prospective clients in the course of the selection process. Moreover, Sec. 9(b) of defendant's Code of Ethics requires its members not to accept work at a fee "below the accepted standards of the profession in the area." As a result of these sections, the only price information available for input into the client's selection equation is a uniformly regular fee schedule. (Footnotes omitted.)

J.A. 9939-40, 389 F. Supp. at 1200.

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Upon careful review of the pertinent authorities, the Court is convinced that the ethical prohibition against competitive

Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150,

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bidding is on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. It is not important to know what effect the Sec. 11(c) prohibition has on the price of professional engineering services. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. at 213. What is of critical significance is that the agreement among defendant's members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining price; to sacrifice freedom in pricing decisions to market stability.

J.A. 9941, 389 F. Supp. at 1200.

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By proscribing competitive bidding, Sec. 11(c) has as its purpose and effect the excision of price considerations from the competitive arena of engineering services. The ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information. The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act.

J.A. 9941, 389 F. Supp. at 1200.

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In determining that the fee schedule in *Goldfarb* constituted a price fixing practice, the Court emphasized the nature of the restraint, the enforcement mechanism, and the fee schedule's adverse impact upon consumers. Defendant NSPE's ban on competitive bidding, like the minimum fee schedule, is not an advisory measure. It is an absolute prohibition on price competition among defendant's members and requires immediate withdrawal should a client insist upon fee proposals or open bidding. *See* 389 F. Supp. at 1195 at n.1 (text of Section 11(c) of NSPE Code of Ethics). The ban clearly impedes the ordinary give and take of the market place and operates "on its face [as] a tampering with the price structure of engineering fees." *Id.* at 1200.

Enforcement of Section 11(c) of the NSPE Code is actively promoted through publications, personal letters, case opinions

226 n.59 (1940). Defendant's prohibition of competitive bidding, by blocking the free flow of price information, strikes at the functioning of the free market.

The Society may not have engaged in direct price fixing as such, but its prohibition of free price competition is not far removed, in both legal and practical consequence.

Society counsel urges that the district court erred in applying a "*per se*" rule and that the latest decisions of the Supreme Court require a more individual probing of the practice assailed, in the particular factual context. This is a false trail. To some extent, a rule that operates to prevent price competition stands at least presumptively condemned in a way that does not apply to other kinds of trade practice rules.

On its face the Society rule before us had a universal sweep, prohibiting all price competition, and on its face the rule is presumptively condemned. The district court did not take the rule solely on its face, and reach a condemnatory result merely because of an unfortunate use of language. It assessed the rule by taking into account

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by defendant's Board of Ethical Review, and state society investigations into alleged misconduct. Conformity with the provision apparently has been achieved as the record reveals no significant resistance by NSPE members to the bidding ban. *Id.* at 1196; *see generally id.* at 1205-07, FFP 27-43. Since engineering services are indispensable to almost any construction project and since alternative sources (e.g., non-licensed professional engineers) are non-existent, the impact upon the public of defendant's pricing restraint is plain. Without the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice. *See, e.g., id.* at 1210-11, FFP 56-61; *see also Goldfarb, supra*, 421 U.S. at 785. The Court therefore finds that the combined character, enforcement, and effort of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*.

J.A. 9987-88, 404 F. Supp. at 460 (on remand).

how it had operated in fact, and with what practical anti-competitive conseqences.

The Society is vexed because the district court did not make findings on its massive evidence, including its 17 expert witnesses, filling the bulk of a joint appendix of 10,000 pages. There was no need for the district court to embark on protracted findings on matters that it considered, in the last analysis, to be unavailing as a defense. Sound antitrust doctrine did not require a simulation of "cost-benefit ratio" analysis, or a "balancing" of the benefits accruing from competitive restraints of this nature.

B.

We interject here to respond to the contention of counsel for the Society this is not a matter for independent analysis of sound antitrust doctrine, and that the case is controlled by the Supreme Court's action on this very case in the wake of its *Goldfarb* ruling. The contention is that because this case was not affirmed by the Supreme Court on its prior visit, but was remanded for further consideration in the light of *Goldfarb,* the total implication was that the decree should be reversed. We see no warrant for this speculative reconstruction. The Supreme Court had just decided *Goldfarb*; instead of taking the time to engage in a detailed study of cases involving closely related issues, it requested the district court to do so. The district court did so, and it concluded that although Goldfarb was not a square holding absolutely in point of its major thrust was in accord with the district court's decree. We think this was a sound discernment of *Goldfarb* and its radiations.

C.

We do not say or imply that there is no room in antitrust law for ethical rules of practice for the learned pro-

fessions, to prevent harm to the lay consumer and general public. What we do say is that the rationalization offered by the Society does not justify the broad ban on all competitive bidding which the Society has attempted to enforce.[4] Section 11(c) has been stolidly applied as a block governing any and all engineering services associated with the study, design, and construction of real property improvements. It does not take into account the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information. It forbids the premature disclosure of all types of fee information—including cost estimates based on man-days of work and percentage of construction cost. The only exception to its broad prohibition concerns fee schedules recommended by the state society.

The full thrust of the defendant's prohibition is sharply etched in the findings of the district court. The district court found that in 1970, the Department of Defense attempted to test a new procedure for the selection of architectural-engineering firms which would include an element of price competition. Under this procedure, prequalified

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[4] We find largely irrelevant, in deciding the issue before us, opinions dealing with the legality of prohibitions on the advertising of professional fees. Consumers Union v. American Bar Association, No. 75-1015-R (E.D. Va. Dec. 15, 1976) (three judge court); Bates v. Arizona State Bar, (Ariz. Sup. Ct. July 26, 1976), *prob. juris. noted,* 97 S.Ct. 53 (1976). Apart from potential distinctions between professions, there is an enormous difference between advertising fee information to the general public and responding to a request for an estimate or bid on a particular job. Fee information thrust at the public is more likely to reach individuals unable to evaluate its significance. In addition, the professional who advertises his fee is generally publicizing a price for a project whose nature is not yet known to him. In contrast, the professional who responds to a request for a bid has a better grasp of the specific task before him and a better opportunity to take into account the sophistication of the potential purchaser. Thus we see no correlation between these two issues.

engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure.

The Society's opposition to the Defense Department's cautious and well conceived experiment is symbolic of the implacability of the Society's campaign to prohibit competitive bidding. Because of the breadth of 11(c) on its face and as enforced, the district court was fully justified in granting the broad injunctive relief. Counsel for the Society puts it that the Society is willing to work out a more refined decree, one more limited in its objectives and restraints. The situation might be different if the Society had taken the initiative along these lines, rather than a kind of all-out resistance to the lawsuit on the ground that its rules were necessary at the very core for sound regulation. The case as it stands presents a Society whose program has been one of all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree. If the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree.

D.

It is in light of the foregoing analysis that we approve the approach taken by the district court, its comment that the Rule is classic price-fixing, and hence illegal "per se," while adding a word of refinement of analysis. A combination "formed for the purpose and with the effect" of fixing or stabilizing prices is illegal *per se*. *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 223; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951). This formulation of doctrine began in *United States v. Trenton Potteries,* 273 U.S. 392, 397-98 (1927), and reached full expression in *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5 (1958), in which the Court explained that price fixing is one of a group of restraints conclusively deemed unreasonable, devoid of any "redeeming virtue" that the law need take into account and measure in the scales. *Id.* at 5. There is a co-existing doctrine that, in limited contexts, permits a business group to adopt a rule or practice that is narrowly defined in terms of intended social benefits notwithstanding potential effect on price, but these limited contexts are inapplicable here.[5] That co-existing doctrine may come to have application to ethical rules of professional

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[5] For example, in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), the effect on price was only a temporary hold, governing only a small part of total transactions, put into effect by a board of trade representing and regulating both buyers and sellers.

The doctrine permitting some trade association reporting, which originated in Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563 (1925), increased the amount of economic information available and thereby facilitated the rational decision-making necessary for effective competition. Further, the nature of the information exchanged, and the absence of any agreement to compel adherence to particular prices, made it highly unlikely that any anti-competitive abuse could occur.

associations narrowly confined to interdiction of abuses,[6] a problem we need not explore in view of the quite different context of this case.

In this case what is presented is a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers. In that context, the absolute rule is fairly identified as a price-sustaining mechanism. The issue is not one of mere semantics, it is one of accurate identification or classification of a rule having regard to its language, purpose and effect. The district court correctly appraised the rule before it as one that at its core "tampers with the price structure,"[7] and as therefore illegal without regard to claimed or possible benefits.

E.

In view of the foregoing, we affirm the district court's decree, except in one respect in which we think the decree is overbroad: It not only enjoins the Society from adopting any policy statement which describes price competition as "unethical," but also orders the Society to state affirmatively that it does not consider competitive bidding to be unethical. To force an association of individuals to express as its own opinion judicially dictated ideas is to encroach on that sphere of free thought and expression protected by the First Amendment. Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest. The decree provision commanding the Society to state that in

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[6] *See generally* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787-88 n.17 (1975).

[7] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

its view certain practices were not unethical goes beyond this. *Cf. National Labor Relations Board v. Teamsters and Chauffeurs Union,* 241 F.2d 428 (7th Cir. 1957); *Edward G. Budd Manufacturing Co. v. National Labor Relations Board,* 142 F.2d 922, 926 (3d Cir. 1944) (company could be required to post notices, but not to forgo expressing its opinions on labor matters). *Compare International Union of Elect'l, Radio and Machine Workers v. NLRB,* 127 U.S.App.D.C. 303, 383 F.2d 230 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 904 (1968). Certainly the harm wrought by the prior statements that the practices were unethical requires corrective action, but we are inclined to the view that the purposes of the Sherman Act would be fully served by a decree forbidding the Society from future expression that the price practice is unethical, and requiring it to publish an advice that its prior ruling has been rescinded in light of the court's decree that it was an unlawful interference with a legal right of the engineer, protected under the antitrust laws, to provide price information to a prospective client in advance of retainer.

The case is remanded with instructions to modify the decree in part; otherwise, the judgment is affirmed.

So ordered.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 2412-72

UNITED STATES OF AMERICA, *Plaintiff*

v.

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, *Defendant.*

(FILED DECEMBER 4, 1975)

Order

This matter having come before the Court upon the application of the defendant pursuant to 15 U.S.C. § 29(b) for an order permitting direct appeal from the Judgment entered herein on November 26, 1975 to the United States Supreme Court, and the Court having fully considered the arguments of the defendant in support of its application and the opposition of the plaintiff to the entry of such an order as well as the record and proceedings herein, it is this 4th day of December, 1975 hereby

ORDERED that the application of the defendant pursuant to 15 U.S.C. § 29(b) for an order permitting direct appeal in this case to the United States Supreme Court is denied.

/s/ JOHN LEWIS SMITH, JR.
United States District Judge

CAPTION OMITTED IN PRINTING

(FILED NOVEMBER 26, 1975)

Judgment

Upon consideration of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court's previous decision in United States v. National Society of Professional Engineers, 389 F.Supp. 1193 (1974), the memoranda of points and authorities submitted by the parties upon remand, and the entire record herein; oral argument of counsel having been heard; and for the reasons set forth in the accompanying Memorandum Opinion, it is by the Court this 26th day of November, 1975

ORDERED, ADJUDGED, and DECREED that this Court's previous Opinion, Findings of Fact and Conclusions of Law are reaffirmed; and it is further

ORDERED, ADJUDGED, and DECREED that:

I

This Court has jurisdiction over the subject matter of this action and the parties hereto.

II

The defendant is found to have violated Section 1 of the Sherman Act (15 U.S.C. § 1) by combining and conspiring with its members and state societies to unreasonably restrain interstate trade and commerce in the sale of engineering services.

III

The provisions of this Final Judgment which apply to the defendant shall also apply to the defendant's officers, directors, agents, employees, successors and assigns, and to all other persons in active concert or participation

with the defendant who receive notice of this Final Judgment by personal service or otherwise.

IV

The defendant is enjoined and restrained from participating in or adopting any plan, program or course of action which in any manner prohibits, discourages or limits members of the defendant from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise has the purpose or effect of suppressing or eliminating competition based upon engineering fees among members of the defendant.

V

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to amend its Code of Ethics, policy statements, opinions of its Board of Ethical Review, manuals, handbooks, rules, constitution, by-laws, resolutions and any other of its statements, guidelines or publications to eliminate therefrom any provisions, including Sections 9(b) and 11(c) of its Code of Ethics and any references thereto, which in any manner prohibit, discourage or limit the submission of price quotations for engineering services by members of the defendant or which state or imply that the submission of price quotations for engineering services or that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.

VI

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to amend its Code of Ethics, policy statements, opinions of its Board of Ethical Review, manuals, handbooks, rules, by-laws,

resolutions and any other of its statements, guidelines or publications to eliminate therefrom all references to engineering fee schedules or guides published by any engineering society. The defendant is further enjoined and restrained from adopting, endorsing or promoting any engineering fee schedule or guide.

VII

The defendant is enjoined and restrained from adopting or disseminating in any of its publications or otherwise, any Code of Ethics, opinion of its Board of Ethical Review, policy statement, rule, by-law, resolution or guideline which in any manner prohibits, discourages or limits the submission of price quotations for engineering services by members of the defendant or which states or implies that the submission of price quotations for engineering services or that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.

VIII

The defendant is ordered and directed, within 60 days of the effective date of this Final Judgment, to send a copy of this Final Judgment to each of its affiliated state engineering societies and local chapters and to each State Board of Engineering Registration in the United States and territories thereof, and to cause the publication of this Final Judgment in the magazine *Professional Engineer* and the newsletter *Private Practice News,* in such a fashion and as prominently as feature articles are regularly published in said magazine and newsletter, and to send a copy of such magazine and newsletter to each member of NSPE and the Professional Engineers in Private Practice section of NSPE. The defendant is further ordered and directed to send a copy of this Final Judgment to each new member of NSPE and to state in any

publication of its Code of Ethics that the submission of price quotations for engineering services at any time and in any amount is not considered an unethical practice. The text of such statement shall first be approved by the plaintiff.

IX

The defendant is ordered and directed to revoke the NSPE charter of and to refuse NSPE affiliation to:

(A) any state engineering society which in any manner prohibits, discourages or limits its members from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise participates in or adopts any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among its members based upon engineering fees; and,

(B) any state engineering society which has within its organization any local chapter which in any manner prohibits, discourages or limits its members from submitting price quotations for engineering services at such times and in such amounts as they may choose or which otherwise participates in or adopts any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among its members based upon engineering fees.

For the purpose of carrying out the provisions of this section the defendant is ordered and directed to require, as a prerequisite for an NSPE charter or continued NSPE affiliation of any state engineering society, that such state engineering society submit to the defendant within 60 days of the effective date of this Final Judgment a written certification by an official of such state engineering society that neither it nor any of its local chapters in any manner prohibit, discourage or limit their members from submitting price quotations for engineering services at such times and in such amounts as they may choose and neither it nor any of its local chapters participate in or have any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among their members based upon engineering fees. The defendant is further enjoined and restrained from granting or continuing an NSPE charter or NSPE affiliation to any state engineering society which does not comply with the defendant's request for the certification required herein. The defendant shall retain each such certification during the period of the NSPE charter or NSPE affiliation of the state engineering societies submitting it.

X

The defendant is ordered and directed to file with the plaintiff 90 days from the effective date of this Final Judgment and on each anniversary date of the effective date of this Final Judgment for a period of five years, a report setting forth the steps it has taken to comply with the provisions of this Final Judgment.

XI

For the purpose of securing compliance with this Final Judgment, any duly authorized representative of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant, made to its principal office, be permitted:

(A) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendant relating to any of the matters contained in this Final Judgment; and,

(B) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview the officers and employees of

said defendant, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, the defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports relating to any of the matters contained in this Final Judgment as may from time to time be requested. No information obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XII

The plaintiff shall recover the costs of this action from the defendant.

XIII

Jurisdiction is retained for the purpose of ordering other specific and further relief herein as the Court upon application of the plaintiff may determine to be necessary or appropriate and consistent with the Opinion of the Court and its Findings of Fact and Conclusions of Law. Jurisdiction is also retained for the purpose of enabling either of the parties to this Final Judgment to apply to the Court at any time for any further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of the violation of any of the provisions contained therein or subsequently ordered upon the application of the plaintiff.

/s/ JOHN LEWIS SMITH, JR.
United States District Judge

STATUTES AND REGULATIONS INVOLVED*

15 U.S.C. § 1 Sherman Act, Section 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with Foreign nations, is declared to be illegal....

Representative United States Statutes, Regulations and Legislative Hisory Regarding Solicitation of Professional Engineering Work by Fee Bidding

Pub. L. No. 68-463 (February 24, 1925).

Pub. L. No. 69-141 (April 22, 1926).

10 U.S.C. § 4540, *see* H.R. Rep. No. 1312, 76th Cong. 1st Sess. 2-3 (1939) and Sen. Rep. No. 667, 76th Cong. 1st Sess. 2-3 (1939).

10 U.S.C. § 7212, *see* H.R. Rep. No. 76, 76th Cong., 1st Sess. 8-9, 10-11 (1939), and Sen. Rep. No. 263, 76th Cong., 1st Sess. 22-23 (1939).

Military Construction and Reserve Forces Facilities Authorization Act, 1971, Pub. L. No. 91-511 (October 26, 1970), 84 Stat. 1204, 1222.

Military Construction and Reserve Forces Facilities Authorization Act, 1972, Pub. L. No. 92-145 (October 27, 1971), 85 Stat. 394, 410.

Military Construction and Reserve Forces Facilities Authorization Act, 1973, Pub. L. No. 92-545 (October 25, 1972), 86 Stat. 1135, 1152.

Reserve Force Facilities Authorization Act, 1974, Pub. L. No. 93-166 (November 29, 1973), 87 Stat. 661.

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* The material contained herein is extracted from the record before the District Court.

10 U.S.C. § 2304(a)(4) (1970), pursuant to which Armed Forces Procurement Regulations were issued, 32 C.R.F. §§ 18.402-1 through 18.405 (1973).

41 U.S.C. § 252(c)(4) (1970).

The Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II, 1972), which provides:

§ 541. *Definitions.*

As used in this subchapter—

(1) The term "firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

(2) The term "agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.

(3) The term "architectural and engineering services" includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. (June 30, 1949, ch. 288, title IX, § 901, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1278.)

§ 542. *Congressional declaration of policy.*

The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. (June 30, 1949, ch. 288, title IX, § 902, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1279).

§ 543. *Requests for data on architectural and engineering services.*

In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms, deemed to be the most highly qualified to provide the services required. (June 30, 1949, ch. 288, title IX, § 903, as added Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1279.)

§ 544. *Negotiation of contracts for architectural and engineering services.*

(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services rendered, the scope, complexity, and professional nature thereof.

(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency

head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached. (June 30, 1949, ch. 288, title IX, § 904, as added Oct. 2[illegible] 1972, Pub. L. 92-582, 86 Stat. 1279.)

See H.R. Rep. No. 92-1188, 92d Cong., Sess. (1972) and Sen. Rep. No. 92-1219, 92d Cong., 2d Sess. (1972).

38 Fed. Reg. 33594 (December 6, 1973).

39 Fed. Reg. 8160-61 (March 4, 1974) (Agency for International Development, Department of State).

41 C.R.F. §§ 5B-3.804 through 5B-3.805-2 (1973) (General Service Administration).

41 C.F.R. §§ 18-4.200 through 18-4.205-3 (1973) (National Aeronautics and Space Administration).

39 Fed. Reg. 10135-38 (March 18, 1974) (Atomic Energy Commission).

41 C.R.F. §§ 8-4.5001 through 8-4.5003-4 (1973) (Veterans Admistration).

41 C.R.F. §§ 12-50.200 through 12-50.206 (1973) (Department of Transportation).

41 C.F.R. § 14-3.802 (1973) (Department of the Interior).

State Statutes and Regulations Regarding Solicitation of Professional Engineering Work By Fee Bidding

Alabama

Ala. Code tit. 46, § 128(20) (Cum. Supp. 1971) provides that the state Board of Registration for Professional Engineers and Land Surveyors may censure or revoke the certificate of any licensed engineer for: "... (2) Any gross negligence, incompetency, violation of the code of ethics prescribed by the Board or any amendment thereof, or misconduct in the practice of engineering ..."

The Code of Ethics prescribed by the state Board provides: "It shall be considered unprofessional and inconsistent with Honorable and Dignified practice for any Professional Engineer ... (4) to compete with another Engineer ... for employment, by reducing his usual charges or the use of unethical practices."

Ala. Code tit. 55, § 507 (Cum. Supp. 1971) provides: "Competitive bids shall not be required for ... contracts for securing of services of attorneys, physicians, architects, teachers, superintendents of construction, artists, appraisers, engineers, consultants, certified public accounts, or other individuals possessing a high degree of professional skill where the personality of the individual plays a decisive part ..."

The foregoing statute comprises an exemption from Ala. Code tit. 55, § 506 requiring competitive bidding for expenditures of state funds.

Alaska

Alaska Stat. § 08-48-111 (1972) authorizes revocation of an engineer's certificate of registration by the State Board of Registration for Architects, Engineers and Land Surveyors for: "... (2) gross negligence, incompetence, or misconduct in the practice of architecture, engineering or land surveying; (3) violation

of this chapter, a regulation adopted under it, or the code of ethics of professional conduct as promulgated by the Board; . . ."

Regulations issued by the Board provide: "The engineer, architect or land surveyor shall seek professional employment on the basis of qualifications and competence for proper accomplishment of the work. He shall not knowingly solicit or submit proposals for professional services on the basis of competitive bidding."

Alaska Stat. § 37.05-230 (1970) provides that: "(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; . . . except that . . . (c) competitive bids need not be required . . . (vi) for professional services; . . ."

Alaska Stat. § 44.43-030 (1967) provides: "If it is not feasible for the staff of the Department of Public Works to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request."

Alaska Stat. § 44.44.030 (1967) similarly provides: "If it is not feasible for the staff of the Department of Highways to perform design and engineering services or surveys, the commissioner may contract with a private engineering firm for design and engineering services or surveys on a negotiated basis after reasonable public notice is given. The prices submitted or negotiated shall be available for public inspection upon request."

Arizona

Ariz. Rev. Stat. Ann. § 41-1052 (Supp. 1973) relating to contracts for professional services, provides: "The selection of such persons shall be determined on the basis of demonstrated competence and qualifications to perform the required type of outside professional services at fair and reasonable compensation." § 41-1055 provides: "No contracts may be awarded pursuant to the provisions of this article solely on the basis of price. The budget unit shall contract with the qualified firm at compensation which the budget unit determines is fair and reasonable, taking into account budgetary limitations, the scope, complexity and professional nature of the services.

Arkansas

Ark. Stat. Ann. § 5-1012 (Supp. 1973) provides: "The Authority is hereby authorized to employ architects to prepare plans, specifications and estimates of cost for the construction of public buildings hereunder and to supervise and inspect such construction. After the Authority shall have approved the plans and specifications prepared by the architect, it shall proceed to advertise for bids and contract for the construction of the public buildings in accordance with applicable laws governing the construction of public buildings. In addition, the Authority is hereby authorized to engage and pay such professional, technical and other help as it shall determine to be necessary or desirable in assisting it to carry out effectively the authorities, functions, powers, and duties conferred and imposed upon it by this Act.

California

Cal. Gov't. Code § 53060 (West Supp. 1974) relates to procurement of engineering services and advice and

exempts from competitive bidding requirements the procurement of professional services. *See Cobb* v. *Pasadena City Board of Education,* 134 Cal. App. 2d 93, 285 P.2d 41 (1955).

Connecticut

Conn. Gen. Stat. Rev. § 20-307 (1972) authorizes suspension or revocation of an engineer's certificate if he: "has been found guilty by the Board [of Registration for Professional Engineers and Land Surveyors] or by a court of competent jurisdiction, of any fraud, deceit, gross negligence, incompetency or misconduct in his professional practice, or if it is shown to the satisfaction of the board that the holder of the certificate has violated any provision of this chapter or any regulation adopted by the board."

The Code of Ethics adopted by the State Board provides: ". . . 3-7 He will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone." Section 20-300-13 of the Board rules provide: "The Board, in enforcement of the Canon of Ethics, will be guided by the interpretation of the Canons published by the National Society for Professional Engineers as rules of professional conduct."

Delaware

Del. Code Ann. tit. 24, § 2823 (Supp. 1972) provides for revocation or suspension of an engineer's authorization to practice if he has committed ". . . B. Any gross negligence, incompetence, or misconduct in the practice of engineering."

Del. Code Ann. tit. 24, § 2816 (Supp. 1972) provides: "The Council shall prepare and publish a Code of Ethics designed for the protection of the public. All

Members, Associate Members, Affiliated Members, holders of Certificates of Authorization, and permittees must subscribe to and follow this Code of Ethics in the practice of Professional Engineering."

The Code of Ethics prepared and published by the Council provides: "5. The Engineer shall solicit or accept work only on the basis of his qualifications . . . B. The engineer shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services based solely on competitive bidding. Competitive bidding is defined as the submission, or receipt, of verbal or written estimates of costs in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on solely a price bid, prior to the time one engineer or one engineering organization has been selected for negotiations. The submission and discussion of data published by professional engineering societies is not considered to constitute competitive bidding."

District of Columbia

D. C. Code Ann. § 1-808 (1973) provides: "Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except . . . (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature. . . ."

Florida

The Consultants' Competitive Negotiations Act, Chap. 73-19 (West's 1973 Fla. Sess. Law Service) pro-

vides for a competitive negotiation procedure to be used for the obtaining of professional engineering services by the state or its agencies, municipalities or political subdivisions, school districts and school boards. The negotiation procedure provides for awarding contracts on the basis of qualifications, with fees negotiated only after selection of the most qualified firm.

Georgia

Ga. Code Ann. § 44-2140 (Supp. 1973) provides for revocation or suspension of an engineer's certificate if he is found guilty of ". . . (b) Any gross negligence, incompetence, or unprofessional conduct in the practice of professional engineering . . . (e) Any violation of the provisions of this Chapter or any rule or regulation promulgated by the Board [of Registration for Professional Engineers and Land Surveyors] pursuant to the power conferred on it by this Chapter.

'Unprofessional conduct,' as referred to in subsection (b) herein for the purposes of the section, shall be defined as a violation of those standards of ethics and professional conduct for professional engineers and land surveyors which have been adopted and promulgated hitherto by the board pursuant to the power conferred upon it to promulgate rules and regulations to effectuate the duties and powers conferred on it by this Chapter."

Rule 180-10-.01 of the Board provides: "In defining misconduct in the practice of professional engineering by a registered professional enginer, the Board will consider among other things, the Code of Ethics adopted by the Board." The Code of Ethics adopted by the Board provides:

"Section 11. The Engineer will not compete unfairly with another engineer by attempting to obtain employ-

ment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

* * *

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. The principles shall be applied by the Engineer in obtaining the services of other professions."

Hawaii

Hawaii Rev. Stat. § 464-10 (1968) provides for revocation or suspension of an engineer's certificate for "gross negligence, incompetency, or misconduct in the practice of his profession or: . . . [for] violating this chapter or the rules or regulations of the Board [of Registration of Professional Engineers, Architects and Surveyors]." Rules and regulations of the Board provide: "1.2.(j) *Misconduct in the Practice.* Miscon-

duct in the practice of the profession of engineering architecture, land surveying or landscape architecture constitutes any or all of the following: . . . (4) To enter into competitive bidding against another on the basis of compensation or to use donation or misleading information on cost as a device for obtaining competitive advantage."

Illinois

Ill. Rev. Stat. ch. 48½, § 49 (Supp. 1974) provides for revocation or suspension of an engineer's certificate for: ". . . 2. Any gross negligence, incompetency or misconduct in the practice of professional engineering . . ."

Rules of Professional Conduct promulgated by the Illinois Department of Registration and Education provide: "5. Solicitation of Work . . . B. The Engineer shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit nor submit proposals for professional services on the basis of competitive bidding. Competitive bidding is defined as the formal or informal submission or receipt of verbal or written estimates of cost or proposals in terms of dollars or percentage of construction cost, or any other measure of compensation whereby the prospective client may compare, on the same defined project, engineering services on a price basis only, prior to the time that one engineer or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding."

Ill. Rev. Stat. An. ch. 24, § 8-10-4 (Supp. 1974), relating to purchasing and public works contracts in cities of more than 500,000 population, provides:

"Contracts which by their nature are not adapted to award by competitive bidding, such as but not limited to contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part . . . shall not be subject to the competitive bidding requirements of this Article."

Indiana

Ind. Ann. Stat. § 63-1517 (Burns Supp. 1973) establishes a State Board of Registration for Professional Engineers and Land Surveyors. Rule No. 14 promulgated by the Board requires adherence to the Canons of Ethics of Engineers as approved by the Engineeer's Council for Professional Development, dated September 30, 1963. That Code of Ethics provides: "He (the engineer) will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone."

Kentucky

Ky. Rev. Stat. § 45.360 (1971) provides: "The director of purchases, under the direction of the commissioner of finance, shall purchase . . . the combined requirements of all spending agencies of the state . . . except that competitive bids may not be required: . . . (f) For professional, technical, or artistic services (contracts exempted by this provision shall be referred to the Department of Personnel for review and approval.)"

Massachusetts

Mass. Gen. Laws Ann. ch. 13, § 45 (1973) establishes a Board of Registration of Professional Engineers and of Land Surveyors. Canons of Ethics adopted by

the Board provide: "He (the engineer) will not invite or submit price proposals for professional services which require creative intellectual effort, on a basis that constitutes competition on price alone. Due regard should be given to all professional aspects of the engagement."

Mass. Gen. Laws Ann. ch. 7, § 30B (Supp. 1973) provides: "Designer selection board. There shall be in the executive office for administration and finance a designer selection board, consisting of the director of building construction *ex officio,* and five members to be appointed by the governor, of whom two shall be registered architects and two shall be registered professional engineers. In making the original appointments to said board, two members shall be appointed for terms of one year and three members shall be appointed for terms of two years. Upon the expiration of the term of any appointive member his successor shall be appointed for a term of two years. The board shall encourage architects and engineers to apply for appointment as project designers, shall assemble and maintain current information concerning the organization, experience and qualifications of architects and engineers interested in acting as project designers, and shall, from time to time, solicit information from or interview such interested architects and engineers. Any project subject to the control and supervision of the director of building construction which is not being undertaken by the operating agency, as provided in section thirty of chapter six A, shall be referred by the commissioner to the board, which shall promptly provide suitable public notice of the proposed project. The operating agency shall delegate a representative to deliberate and vote with the board on its recommendations to the commissioner concerning the selection of a designer for the project. The board shall, on the basis of such criteria as it deems appropriate, and

after a review of information submitted by all persons applying for appointment and interviews, where appropriate, recommend to the comissioner at least three designers for each project. The board's recommendation shall be in writing and shall constitute a public record. The recommendation of designers by the board shall be advisory to the commissioner. The commissioner shall, after receiving the board's recommendation, appoint the project designer. In the case of clearly separable work on one project, the board may recommend and the commissioner may appoint more than one designer, if in his opinion such action would benefit the commonwealth. If the board deems it appropriate it may recommend that the commissioner hold a design competition to select a project designer. The board shall establish the scope and rules for such competition. If the commissioner decides to hold such competition he shall hold the competition in accordance with the scope and rules established by the board and shall appoint as such project designer the winner in such competition. No person shall be appointed a designer unless he is a registered architect or a registered professional engineer, nor shall any partnership or corporation be so appointed unless at the time thereof a majority of the partners or the directors of the corporation shall be so registered. When the commissioner appoints a designer, he shall forthwith notify in writing the secretary of transportation and construction of the appointment, and said secretary shall instruct the director of building construction forthwith to enter into a contract with the designer, subject to such conditions as the commissioner may set forth in said notice."

Minnesota

Min. Stat. Ann. § 326.04 (Supp. 1974) establishes a State Board of Registration for Architects, Engineers,

and Land Surveyors. Rules of Professional Conduct adopted by the Board provide that each applicant shall agree "... (8) To uphold the principles of appropriate and adequate compensation for professional services and to refrain from improper or questionable methods of soliciting work."

Mississippi

An opinion of the Attorney General of Mississippi, dated January 11, 1958, states: "I am of the opinion that a contract for professional engineering services is just like that for any other professional services, such as an Attorney and that a public agency is not required by law to advertise for bids for such professional engineering services."

Montana

Mont. Rev. Codes Ann. § 66-2327 (1970) establishes a State Board of Registration for Professional Engineers and Land Surveyors. [Renamed Board of Professional Engineers and Land Surveyors, Mont. Rev. Codes Ann. § 82A-1602(11) (Supp. 1973).] Section 40-3.86(6)-58690 of the Rules promulgated by the Board provides: "The Board will expect all engineers and land surveyors to uphold and advance the honor and dignity of the Engineering and Surveying Profession and Registration law within the ethical standards set forth in both the Code of Ethics included in the application form and as published by the National Society of Professional Engineers."

Nevada

Nev. Rev. Stat. § 625.410 (1967) provides for revocation or suspension of an engineer's certificate if he is found guilty of "... 2. Any gross negligence, incompetency or misconduct in the practice of professional engineering ..."

Nev. Rev. Stat, § 625.140 (1971) provides: "The Board [of Registered Professional Engineers] shall have the power to make all bylaws and rules, including the adoption and promulgation of a code of conduct which shall be binding upon persons registered under this chapter, not inconsistent with the constitution and laws of this state, which may be reasonably necessary for the proper performance of the duties of the board, the regulation of the proceedings before it and the maintenance of a high standard of integrity and dignity in the profession. The initial code of conduct shall be submitted for ratification to all persons registered under this chapter, and ratification shall be accomplished by the approving vote of a minority of such registered persons who are residing in the State of Nevada on the date such code is submitted for ratification."

The Code of Conduct adopted by the Board provides: "They (registered engineers) will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone."

New Hampshire

N.H. Rev. Stat. Ann. § 8:32-a (Supp. 1973) provides:

"I. The general court of New Hampshire hereby declares that it shall be the policy of the state and its agencies to negotiate contracts for engineering and architectural services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices and to encourage members of these professions engaged in the lawful practice of their profession to submit to agency heads, annually, a statement of qualifications and performance data.

II. Each agency shall prepare a description of its procedures for procurement of architectural and engineering services. The agency head, for each proposed project, shall review and consider the current statements of qualifications and performance data and availability of not less than three firms. He shall for purposes of negotiation, arrange the firms deemed to be best qualified in order of preference as determined in accordance with the prescribed procedures of the agency.

III. The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the state. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

IV. Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the state, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

V. Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

New Jersey

N. J. Stat. Ann. § 40A:11-1 *et seq.* (Special Pamphlet 1973), the New Jersey Local Public Contracts Law, requires competitive bidding for contracts let by municipalities, counties and political subdivisions of municipalities and counties involving expenditures over $2,500.

N.J. Stat. Ann. § 40A:11-5 (Special Pamphlet 1973) provides: "Any purchase, contract or agreement of the character described in section 4 of this act may be made, negotiated or awarded without public advertising for bids and bidding therefor if (1) The subject matter thereof consists of (a) Profesional services ..."

N. J. Stat. Ann. § 27:12B-5.2 (Supp. 1974) requires advertising and selection by competitive bidding for contracts entered into by the New Jersey Highway Authority involving expenditures over $2,500 "... provided, however, that such advertising shall not be required where the contract to be entered into is one for the furnishing or performing services of a professional nature . . ."

North Carolina

N. C. Gen. Stat. § 289-4 (Cum. Supp. 1973) establishes a State Board of Registration for Professional Engineers and Land Surveyors. The Code of Ethics adopted by the Board provides: "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods . . . c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional en-

gineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

North Dakota

N.D. Cent. Code § 43-19.1-03 (Supp. 1973) establishes a State Board of Registration for Professional Engineeers and Land Surveyors. N.D. Cent. Code § 4-19.1-24 (Supp. 1973) provides: "The board shall cause to have prepared and shall adopt a code of ethics, a copy of which shall be delivered to every registrant and applicant for registration under this chapter, and which shall be published in the roster provided for herein. The board may revise and amend this code of ethics from time to time, and shall forthwith notify each registrant in writing of such revisions or amendments. Such code of ethics when adopted shall apply to all certificate holders, including specialists in a particular branch of the engineering or surveying profession.

The Code of Ethics adopted by the Board provides: "Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods . . .(c). He shall not solicit or submit engineering proposals on the basis of competitive bidding. [Competitive bidding] [f]or professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. An engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he may withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

Ohio

Ohio Rev. Code Ann. § 4733.20 (Page Supp. 1972) provides for revocation or suspension of an engineer's certificate if he is found guilty of ". . . (5) Violation of the code of ethics promulgated and adopted by the state board of registration for professional engineers and surveyors."

The Code of Ethics promulgated and adopted by the Board provides in ES-27-06(B): "The Engineer or Surveyor shall seek professional employment on

the basis of qualification and competence for proper accomplishment of the work. He shall not knowingly solicit or submit proposals for Professional Services on the basis of competitive bidding."

Ohio Rev. Code Ann. § 307.86 (Page Supp. 1972) provides: "Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service except the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser by or on behalf of the county or contracting authority, . . . at a cost in excess of two thousand dollars, . . . shall be obtained through competitive bidding."

Oklahoma

Okla. Stat. Ann. tit. 59, § 475.18 (1971) provides for revocation or suspension of an engineer's certificate if he is found guilty of ". . . (d) violation of the Code of Ethics adopted and promulgated by the Board [of Registration for Professional Engineers and Land Surveyors]. The Code of Ethics adopted and promulgated by the Board provides: "Each registrant of the Oklahoma State Board of Registration for Professional Engineers and Land Surveyors will uphold and advance the honor and dignity of the engineering and surveying profession and in particular will comply with following canons: . . . 3—Refrain from submitting competitive bids for professional services or using other improper or questionable methods of soliciting professional work."

Okla. Stat. Ann. tit. 74, § 85.7 (Supp. 1974) provides: "No acquisition or contract shall be made in excess of Five Hundred Dollars ($500.00) without the submis-

sion of competitive bids by the State Purchasing Director, and such acquisition or contract shall be awarded to the lowest and best bidder therefor at a specified time and place, which shall be open to the public, with such preference between bidders offering substantially the same products or services at substantially the same prices, as may be set under the authority of Section 5(7) (74 O.S. 1961, § 85.5(7)). Provided, that such competitive bid requirement shall not apply to contracts for architectural, engineering, legal, and other professional services; . . ."

Oregon

Ore. Rev. Stat. § 672.240 (1971) establishes a State Board of Engineering Examiners. Rules of Professional Conduct prescribed by the Board provides: ". . . (b) The Engineer or Land Surveyor shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services solely on the basis of competitive bidding. The disclosure of recommended fee schedules prepared by various engineering or land surveying societies is not considered to constitute competitive bidding."

Ore. Rev. Stat. § 672.200 (1971) provides for revocacation or suspension of an engineer's certificate ". . . (4) For any violation of the rules of professional conduct prescribed by the Board."

Pennsylvania

Pa. Stat. Ann. tit. 53, § 46402 (Supp. 1974) governs purchasing by the various boroughs in the state and requires competitive bidding on contracts over $1,000 except as provides in § 46402(d). § 46402(d)(5) provides: "The contracts or purchases made by council,

involving an expenditure of over one thousand dollars ($1,000), which shall not require advertising or bidding as hereinbefore provided, are as follows: . . . (5) Those involving personal or professional services."

South Carolina

S.C. Code Ann. § 56-704 (1962) establishes a State Board of Engineering Examiners. Rules of Professional Conduct adopted by the Board provide: "The Engineer or Land Surveyor shall solicit or accept work only on the basis of his qualification."

South Dakota

S. D. Compiled Laws Ann. § 36-18-9 (1972) establishes a State Board of Engineering and Architectural Examiners. S. D. Compiled Laws Ann. § 36-18-25.2 (1972) provides: "The board shall cause to have prepared and shall, in compliance with chapter 1-26, adopt a code of ethics, a copy of which shall be delivered to every registrant and applicant for registration under this chapter, and which shall be published in the roster provided for herein. Such publication shall constitute due notice to all registrants. Such code of ethics when adopted shall apply to all certificate holders, including specialists in any particular branch of a profession registered hereunder. Each registrant shall sign and return to the secretary of the board a statement stating that he will abide by the code of ethics. Violation of the code of ethics may be a basis for action on a certificate of registration or for an injunction but shall not also be the basis for criminal prosecution unless otherwise declared unlawful."

The Code of Ethics adopted by the Board provides: ". . . 4. He will, in his endeavor to secure engagements, negotiate only on the basis of fixed charges and will

never enter into competitive bidding to secure engagements."

Tennessee

Tenn. Code Ann. § 62-202 (1955) establishes a State Board of Examiners for Architects and Engineers. Rules of Professional Conduct adopted by the Board provide: "The Architect or Engineer shall solicit or accept work only on the basis of his qualifications."

Tenn. Code Ann. § 12-432 (1973) provides: "*Bids for professional services awarded on basis of competence and integrity.* Contracts by counties, cities, metropolitan governments, towns, utility districts and other municipal and public corporations of this state for legal services, fiscal agents or financial advisors or advisory services, educational consultants, and similar services by professional persons or groups of high ethical standards, shall not be based upon competitive bids, but shall be awarded on the basis of recognized competence and integrity."

Texas

Tex. Rev. Civ. Stat. Ann. art. 3271a, § 3 (1968) establishes a State Board of Registration for Professional Engineers.

Tex. Rev. Civ. Stat. Ann. art. 3721a, § 8 (1968) provides: "The Board shall have the authority and power to make and enforce all rules and regulations necessary for the performance of its duties, to establish standards of conduct and ethics for engineers in keeping with the purposes and intent of this Act or to insure strict compliance with and enforcement of this Act. The violation by any engineer of any provision of this Act or any rule or regulation of the Board shall be a sufficient reason or ground to suspend or

revoke the certificate of registration of such engineer . . ."

The Code of Responsibility for Professional Engineers adopted and promulgated by the Board provides: "Canon V—The engineer should endeavor to build his practice and professional reputation solely on the merit of his services. . . . EC5.2 Competition in a learned profession, such as Engineering, should be based upon the excellence, quality and efficacy of professional performance only. Competitive bidding solely upon the basis of price has no place in the practice of learned professions. As the courts and Legislature of this State have recognized, competitive bidding for Professional Engineering services solely on the basis of price probably would be the best method that could be conceived for clients to obtain the services of the least competent practitioners, and would be disastrous to the welfare of the public. EC5.3 Competitive bidding to obtain work requiring Professional Engineering services is not in the public interest; is a form of solicitation; and is conduct contrary to that practiced in other learned professions in this State. . . . DR5.4 Competitive bidding for Professional Engineering services is not in the public interest, is a form of solicitation, and is conduct contrary to the practices in this State, and, as such, is a violation of the Texas Engineering Practice Act. (a) A competitive bid for Engineering services is defined as the publication or communication to a prospective client of a proposal or estimate of the fee or compensation to be received for Engineering services, which is published or communicated with the knowledge or reasonable expectation that similar proposals or estimates for said Engineering services are being solicited from any other Engineer, or Engineering firm, partnership or corporation engaged in the practice of

Engineering by authority of Section 17 of the Texas Engineering Practice Act; however, (b) The Engineer shall not be considered in violation of the Act in cases where his Engineering services are offered, furnished, or performed as an integral part of research and development programs, construction projects, manufactured products, processes, or devices, which are to be offered, performed, supplied or obtained on the basis of competitive bids."

Tex. Rev. Civ. Stat. Ann. art. 664-4 (Supp. 1974) provides: "Section 1. This Act shall be known and may be cited as the 'Professional Services Procurement Act.' Section 2. For purposes of this Act the term 'professional services' shall mean those within the scope of the practice of accounting, architecture, optometry, medicine or professional engineering as defined by the laws of the State of Texas or those performed by any licensed architect, optometrist, physician, surgeon, certified public accountant or professional engineer in connection with his professional employment or practice. Section 3. No state agency, political subdivision, county, municipality, district, authority or publicly owned utility of the State of Texas shall make any contract for, or engage the professional services of, any licensed physician, optometrist, surgeon, architect, certified public accountant or registered engineer, or any group or association thereof, selected on the basis of competitive bids for such contract or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of professional services to be performed and at fair and reasonable prices, as long as professional fees are consistent with and not higher than the published recommended practices and fees of the various applicable professional associations

and do not exceed the maximum provided by any state law. Section 4. Any and all such contracts, agreements or arrangements for professional services negotiated, made or entered into, directly or indirectly, by any agency or department of the State of Texas, county, municipality, political subdivision, district, authority or publicly-owned utility in any way in violation of the provisions of this Act or any part thereof are hereby declared not to be given effect or enforced by any Court of this State or by any of its public officers or employees.

Virginia

Va. Code Ann. § 54-18 (1972) establishes a State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors.

Chapter 459 of the 1974 Virginia Session Laws, signed by the Governor April 7, 1974, amends Va. Code Ann. § 54-25 (1972) to provide: "The Board shall promulgate all necessary rules and regulations not inconsistent with this chapter, for its own organization, and as to the professional qualifications of applicants, the requirements necessary for passing examinations, in whole or in part, and as to all things necessary or expedient for the proper conduct of its examinations and the proper discharge of its duties.

Such rules and regulations may include a code of professional practice and conduct, the provisions of which shall serve any or all of the following purposes: . . . (4) The prohibition of solicitation or acceptance of work by professionals on any basis other than their qualifications for the work offered; . . ."

Washington

Wash. Rev. Code Ann. § 18.43-110 (1961) provides for revocation of an engineer's certificate if he is

found guilty of " . . . Any gross negligence, incompetency, or misconduct in the practice of engineering . . ." "Misconduct" is defined in Wash. Rev. Code Ann. § 18.43-105 (1961) to include: ". . . (9) Unfair competition—Reducing a fee quoted for prospective employment or retainer as an engineer after being informed of the fee quoted by another engineer for the same employment or retainer; . . . (11) Committing any other act, or failing to act, which act or failure are customarily regarded as being contrary to the accepted professional conduct or standard generally expected of those practicing professional engineering or land surveying."

West Virginia

W.Va. Code Ann. § 30-13-3 (1971) establishes a State Board of Registration for Professional Engineers.

Regulations issued by the Board provide: ". . . § 6.02 The Board may suspend or revoke the certificate of registration of any professional engineer registered hereunder who fails to conform to rules of professional conduct as set forth below . . . E.(2) He shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work. He shall not solicit or submit proposals for professional services on the basis of competitive bidding. Competitive bidding is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer or one engineering organization, has been selected for negotiations; provided, however, the

submission and discussion of data published by professional engineering societies is not considered to constitute competitive bidding."

Wyoming

Wyo. Stat. Ann. § 15.1-13 (Supp. 1973) provides: "*Contracts for public improvements generally.* All contracts for purchases of property or for any public improvement, contracts relating to the municipal water supply, contracts for the lighting of streets, public buildings and public places, and any other public work or improvement excepting contracts for engineering services required to complete such improvements for any city or town when the cost exceeds $1,500 shall be advertised for bid."

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS CODE OF ETHICS FOR ENGINEERS

Preamble

The Engineer, to uphold and advance the honor and dignity of the engineering profession and in keeping with high standards of ethical conduct:

- *Will be honest and impartial, and will serve with devotion his employer, his clients, and the public;*
- *Will strive to increase the competence and prestige of the engineering profession;*
- *Will use his knowledge and skill for the advancement of human welfare.*

SECTION 1—The Engineer will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee.

a. He will be realistic and honest in all estimates, reports, statements, and testimony.

b. He will admit and accept his own errors when proven wrong and refrain from distorting or altering the facts in an attempt to justify his decision.

c. He will advise his client or employer when he believes a project will not be successful.

d. He will not accept outside employment to the detriment of his regular work or interest, or without the consent of his employer.

e. He will not attempt to attract an engineer from another employer by false or misleading pretenses.

f. He will not actively participate in strikes, picket lines, or other collective coercive action.

g. He will avoid any act tending to promote his own interest at the expense of the dignity and integrity of the profession.

SECTION 2—The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by non-technical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.

a. He will regard his duty to the public welfare as paramount.

b. He shall seek opportunities to be of constructive service in civic affairs and work for the advancement of the safety, health and well-being of his community.

c. He will not complete, sign, or seal plans and/or specifications that are not of a design safe to the public health and welfare and in conformity with accepted engineering

standards. If the client or employer insists on such unprofessional conduct, he shall notify the proper authorities and withdraw from further service on the project.

SECTION 3—The Engineer will avoid all conduct or practice likely to discredit or unfavorably reflect upon the dignity or honor of the profession.

a. The Engineer shall not advertise his professional services but may utilize the following means of identification:

(1) Professional cards and listings in recognized and dignified publications, provided they are consistent in size and are in a section of the publication regularly devoted to such professional cards and listings. The information displayed must be restricted to firm name, address, telephone number, appropriate symbol, name of principal participants and the fields of practice in which the firm is qualified.

(2) Signs on equipment, offices and at the site of projects for which he renders services, limited to firm name, address, telephone number and type of services, as appropriate.

(3) Brochures, business cards, letterheads and other factual representations of experience, facilities, personnel and capacity to render service, providing the same are not misleading relative to the extent of participation in the projects cited, and provided the same are not indiscriminately distributed.

(4) Listings in the classified section of telephone directories, limited to name, address, telephone number and specialties in which the firm is qualified.

b. The Engineer may advertise for recruitment of personnel in appropriate publications or by special distribution. The information presented must be displayed in a dignified manner, restricted to firm name, address, telephone number, appropriate symbol, name of principal participants, the fields of practice in which the firm is qualified and factual descriptions of positions available, qualifications required and benefits available.

c. The Engineer may prepare articles for the lay or technical press which are factual, dignified and free from ostentations or laudatory implications. Such articles shall not imply other than his direct participation in the work described unless credit is given to others for their share of the work.

d. The Engineer may extend permission for his name to be used in commercial advertisements, such as may be published by manufacturers, contractors, material suppliers, etc., only by means of a modest dignified notation acknowledging his participation and the scope thereof in the project or product described. Such permission shall not include public endorsement of proprietary products.

e. The Engineer will not allow himself to be listed for employment using exaggerated statements of his qualifications.

SECTION 4—The Engineer will endeavor to extend public knowledge and appreciation of engineering and its achievements and to protect the engineering profession from misrepresentation and misunderstanding.

a. He shall not issue statements, criticisms, or arguments on matters connected with public policy which are inspired or paid for by private interests, unless he indicates on whose behalf he is making the statement.

SECTION 5—The Engineer will express an opinion of an engineering subject only when founded on adequate knowledge and honest conviction.

a. The Engineer will insist on the use of facts in reference to an engineering project in a group discussion, public forum or publication of articles.

SECTION 6—The Engineer will undertake engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service.

SECTION 7—The Engineer will not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent.

a. While in the employ of others, he will not enter promotional efforts or negotiations for work or make arrangements for other employment as a principal or to practice in connection with a specific project for which he has gained particular and specialized knowledge without the consent of all interested parties.

SECTION 8—The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client.

a. The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer.

b. When in public service as a member, advisor, or employee of a governmental body or department, an Engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice.

c. An Engineer shall not solicit or accept an engineering contract from a governmental body on which a principal or officer of his organization serves as a member.

SECTION 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work.

a. He will not undertake or agree to perform any engineering service on a free basis, except for civic, charitable, religious, or eleemosynary nonprofit organizations when the professional services are advisory in nature.

b. He will not undertake work at a fee or salary below the accepted standards of the profession in the area.

c. He will not accept remuneration from either an employee or employment agency for giving employment.

d. When hiring other engineers, he shall offer a salary according to the engineer's qualifications and the recognized standards in the particular geographical area.

e. If, in sales employ, he will not offer, or give engineering consultation, or designs, or advice other than specifically applying to the equipment being sold.

SECTION 10—The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties.

a. He will not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.

b. He will not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with his clients or employer in connection with work for which he is responsible.

SECTION 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competi-

tive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

a. The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment.

b. He will not pay, or offer to pay, either directly or indirectly, any commission, political contribution, or a gift, or other consideration in order to secure work, exclusive of securing salaried positions through employment agencies.

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals.

d. An Engineer shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which his professional judgment may be

compromised or when a contingency provision is used as a device for promoting or securing a professional commission.

e. While in a salaried position, he will accept part-time engineering work only at a salary or fee not less than that recognized as standard in the area.

f. An Engineer will not use equipment, supplies, laboratory, or office facilities of his employer to carry on outside private practice without consent.

SECTION 12—The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice or employment of another engineer, nor will he indiscriminately criticize another engineer's work. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action.

a. An Engineer in private practice will not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.

b. An Engineer in governmental, industrial or educational employ is entitled to review and evaluate the work of other engineers when so required by his employment duties.

c. An Engineer in sales or industrial employ is entitled to make engineering comparisons of his products with products by other suppliers.

SECTION 13—The Engineer will not associate with or allow the use of his name by an enterprise of questionable character, nor will he become professionally associated with engineers who do not conform to ethical practices, or with persons not legally qualified to render the professional services for which the association is intended.

a. He will conform with registration laws in his practice of engineering.

b. He will not use association with a nonengineer, a corporation, or partnership, as a "cloak" for unethical acts but must accept personal responsibility for his professional acts.

SECTION 14—The Engineer will give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.

a. Whenever possible, he will name the person or persons who may be individually responsible for designs, inventions, writings, or other accomplishments.

b. When an Engineer uses designs supplied to him by a client, the designs remain the property of the client and should not be duplicated by the Engineer for others without express permission.

c. Before undertaking work for others in connection with which he may make improvements, plans, designs, inventions, or other records which may justify copyrights or patents, the Engineer should enter into a positive agreement regarding the ownership.

d. Designs, data, records, and notes made by an engineer and referring exclusively to his employer's work are his employer's property.

SECTION 15—The Engineer will cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students, and will endeavor to provide opportunity for the professional development and advancement of engineers under his supervision.

a. He will encourage his engineering employees' efforts to improve their education.

b. He will encourage engineering employees to attend and present papers at professional and technical society meetings.

c. He will urge his engineering employees to become registered at the earliest possible date.

d. He will assign a professional engineer duties of a nature to utilize his full training and experience, insofar as possible, and delegate lesser functions to subprofessionals or to technicians.

e. He will provide a prospective engineering employee with complete information on working conditions and his proposed status of employment, and after employment will keep him informed of any changes in them.

Note: In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.

(NSPE publication No. 1102 As Revised January 1974)

[Defendant's Exhibit 215]

JUDICIAL DECISIONS REGARDING SOLICITATION OF PROFESSIONAL WORK BY FEE BIDDING

1. *City of Inglewood—L.A. City Civ. Ctr. Auth.* v. *Superior Ct.*, 103 Cal. Rptr. 689, 500 P.2d 601 (1972).
2. *Willis* v. *Santa Ana Community Hospital Assn.*, 26 Cal. Rptr. 640, 376 P.2d 568 (1962).
3. *Kennedy* v. *Ross*, 28 Cal. 2d 569, 170 P.2d 904 (1946).
4. *City and County of San Francisco* v. *Boyd*, 17 Cal.2d 606, 110 P.2d 1036 (1941).
5. *Cobb* v. *Pasadena City Board of Education*, 134 Cal. App.2d 93, 285 P.2d 41 (1955).
6. *Miller* v. *Boyle*, 43 Cal. App. 39, 184 P.421 (1919).
7. *McNichols* v. *City and County of Denver*, 274 P.2d 317 (Colo. 1954).
8. *City of Pensacola* v. *Kirby*, 47 So.2d 533 (Fla. 1950).
9. *Cress* v. *State*, 198 Ind. 323, 152 N.E. 822 (1926).
10. *City of Hazard* v. *Salyers*, 311 Ky. 667, 224 S.W.2d 420 (1949).
11. *Jeffersontown* v. *Cassin*, 267 Ky. 568, 102 S.W.2d 1001 (1937).
13. *Rollins* v. *City of Salem*, 251 Mass. 468, 146 N.E. 795 (1925).
14. *City of Grand Rapids* v. *Harper*, Dkt. No. 9229 (Circuit Court for Kent County, Michigan, 1969).
15. *Krohnberg* v. *Pass*, 187 Minn. 73, 244 N.W. 329 (1932).
16. *Hellman* v. *St. Louis County*, 302 S.W.2d 911 (Mo. 1957).

17. *Lane-Western Co.* v. *Buchanan County, Mo.*, 85 F.2d 343, 347 (8th Cir. 1936).
18. *Cosentino* v. *City of Omaha*, 186 Neb. 407, 183 N.W.2d 475 (1971).
19. *Franklin* v. *Horton*, 97 N.J.L. 25, 116 A. 176 (1922).
20. *Heston* v. *Atlantic City*, 93 N.J.L. 317, 107 A. 820 (1919).
21. *Neal* v. *Board of Education*, 40 N.M. 13, 52 P.2d 614, 615 (1935).
22. *Potts* v. *City of Utica*, 86 F.2d 616 (2d Cir. 1936).
23. *Lincoln Rochester Trust Co.* v. *Freeman*, 34 N.Y.2d 1, 355 N.Y.S.2d 336 (1974).
24. *People ex rel. Smith* v. *Flagg*, 17 N.Y. 584 (1858).
25. *City of New York* v. *Beame*, 37 App. Div.2d 89, 322 N.Y.S.2d 503 (1971).
26. *Hurd* v. *Erie County*, 34 App. Div.2d 289, 36 N.Y.S.2d 953 (1970).
27. *People ex rel. Kiehm* v. *Board of Education*, 198 App. Div. 476, 190 N.Y.S. 798 (1921).
28. *Vermeule* v. *City of Corning*, 186 App. Div. 206, 174 N.Y.S. 220 (1919), *aff'd per curiam*, 230 N.Y. 585, 130 N.E. 903 (1920).
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36. *Stratton* v. *Allegheny County,* 245 Pa. 519, 91 A. 894 (1914).

37. *Idell* v. *County of Delaware,* 15 Del. Co. 450, 34 York Leg. Rec. 188 (Pa. 1920).

38. *Foss* v. *Spitznagel,* 77 S.D. 633, 97 N.W.2d 856 (1959).

39. *Codington County* v. *Board of Commerce of Codington County,* 51 S.D. 131, 212 N.W. 626 (1927).

40. *Modjeski and Masters* v. *Pack,* 215 Tenn. 629, 388 S.W. 2d 144 (1965).

41. *Stephens County* v. *J. N. McCammon, Inc.,* 122 Tex. 148, 52 S.W.2d 53 (1932).

42. *Gulf Bitulithic Co.* v. *Nueces County,* 11 S.W.2d 305 (Tex. 1928).

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44. *Hunter* v. *Whiteaker & Washington,* 230 S.W. 1096 (Tex. Civ. App. 1921).

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No. 76-1767

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The initial opinion and findings of fact and conclusions of law of the district court are reported at 389 F. Supp. 1193. The opinion of the district court following this Court's remand for further consideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, is reported at 404 F. Supp. 457. The opinion of the court of appeals affirming the decision of the dis-

trict court but modifying its decree in part (Pet. App. A-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977. The petition for a writ of certiorari was filed on June 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a comprehensive ban on competitive price bidding for engineering services promulgated and enforced by the National Society of Professional Engineers violates Section 1 of the Sherman Act.

2. Whether the judgment of the district court, enjoining the Society from taking actions or making statements that would have the effect of perpetuating its unlawful ban on competitive price bidding for engineering services, is consistent with the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

STATEMENT

In this civil antitrust suit by the United States, the district court initially found that petitioner, the National Society of Professional Engineers ("NSPE"), violated Section 1 of the Sherman Act by conspiring with its members and various state engineering societies to eliminate any form of competitive price bidding in the sale of engineering services. 389 F. Supp. 1193. While NSPE's direct appeal to this Court was pending, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, was decided. The Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Goldfarb*. 422 U.S. 1031. Upon such reconsideration, the district court reaffirmed its earlier findings and conclusions. 404 F. Supp. 457. The court of appeals affirmed (Pet. App. A-2 to A-13).

1. NSPE is an organization formed to promote the economic, professional and social interests of engineers (F. 3, 389 F. Supp. at 1202).[1] It is incorporated and has affiliated state societies and local chap-

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[1] "F." refers to the district court's findings of fact.

ters in every state and territory; a person who joins NSPE simultaneously joins the appropriate state society and local chapter (F. 11, 12, 389 F. Supp. at 1203).[2] NSPE has approximately 69,000 members, 55,000 of whom are registered under the laws of the several states (F. 2, *id.* at 1202).

Approximately 12,000 NSPE members are consulting engineers who provide services for a fee (F. 4, 19, *id.* at 1202, 1204).[3] Consulting engineers are employed by or operate engineering firms that vary in size from one-man firms to publicly held corporations which actively market and promote their services nationwide (F. 9, 18, 19, 20, *id.* at 1202, 1204).[4] The majority of consulting engineers are in practice in five broad areas of engineering (civil, mechanical, electrical, chemical, and mining), and may confine

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[2] The converse is also true; an engineer who joins a state society automatically becomes a member of NSPE (F. 12, *id.* at 1203).

[3] There are approximately 325,000 registered professional engineers in America; roughly half are consulting engineers (F. 7, *id.* at 1202).

[4] Although 60 percent of engineering firms employ fewer than five engineers (F. 6, *id.* at 1202), larger firms account for a substantial part of total engineering revenues. For example, in 1972 the 438 largest architectual-engineering design firms accounted for approximately $2.2 billion in fees (F. 17, *id.* at 1204). See also F. 21, *ibid.*

In addition, there are several large "design/construct" firms, which construct projects in addition to doing consulting engineering; the 62 largest design/construct firms in 1972 received contracts totalling $26 billion (F. 24, *id.* at 1205).

their practice to more specialized areas within these categories (F. 7, 389 F. Supp. at 1202).

Engineering services are vital to the study, design, and construction of all types of structures, and the sale of those services is a substantial and profitable business (F. 19, *id.* at 1204). Engineers, usually in conjunction with architects, work on projects worth many billions of dollars. Engineering fees alone amount to 5 percent to 6 percent of total construction costs, and architect-engineer fees annually total around $4.7 billion (F. 16, 17, *id.* at 1203-1204).

Since 1964 NSPE has had a Code of Ethics that establishes rules enforced by NSPE and its affiliated state societies (F. 26, 52, *id.* at 1205, 1210). A determination that an engineer has violated the Code not only can engender society sanctions, but generally is damaging to the engineer's professional standing (F. 52, 55, *id.* at 1210).

Section 11(c) of the Code of Ethics prohibits members from submitting any information, directly or indirectly, to the prospective client concerning the price of an engineering project until the client has selected an engineer or engineering organization for negotiation of a contract (F. 26, *id.* at 1205). The district court found that from July 1966 to July 1972, the ban applied to all services provided by an engineering firm (F. 28, *id.* at 1206), and after July 1972, it applied to all "professional services associated with the study, design and construction of real property improvements (public and private) * * *" (F. 56,

id. at 1216).[5] The sole exception to the ban is the provision in Section 11(c) that members may disclose "recommended fee schedules prepared by various engineering societies * * *" (F. 26, *id.* at 1205). In turn, deviations from the fees set forth in the state or local fee schedule violate Section 9(b) of the Code (F. 31, 32, 39, 40, 389 F. Supp. at 1206, 1207).[6]

If an engineer is requested to supply a price other than the state or local society's fee schedule prior to the start of negotiations, Section 11(c) requires that he "withdraw from consideration for the proposed work" (F. 26, 30, *id.* at 1205, 1206).[7] Thus, the prospective purchaser of engineering services must select one engineering firm with which to negotiate, solely on the basis of background and reputation and, except for the state or local society's recommended fee schedule, in ignorance of the cost of those services (J.A. 9930; F. 45, J.A. 9970).

NSPE has publicized and enforced the ban. It has distributed pamphlets to members and customers, published interpretations of the Code in the NSPE magazine, and made speeches supporting the ban (F. 30, 35, 36, 37, 42, 389 F. Supp. at 1206-1207, 1208; F. 21, 27, 28, 33, *id.* at 1204, 1205-1206). NSPE advised its members that adherence to the rule against competitive bidding would protect higher engineering fees (F. 35, *id.* at 1206).[8] It has emphasized to the engineer in private practice "that in the long run he reduces his own fee capability by bidding" (GX 213, J.A. 6300). One pamphlet noted that "[s]ome firms have already been forced out of business due to financial failure caused by competitive bidding" (GX 215, p. 3, J.A. 6304; F. 36, *id.* at 1207).

Enforcement efforts have been widespread. For example, in 1970, NSPE organized its members in a successful refusal to submit competitive bids to the Department of Defense (F. 46-51, *id.* at 1208-1210).[9]

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[5] This finding is contrary to petitioner's claim that the ban has been applied only to engineering "work which immediately affects public safety" (Pet. 10, 12).

[6] Section 9(b) provides (Pet. App. A-55; emphasis in original):

> Section 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work.
>
> * * * *
>
> b. *He will not undertake work at a fee or salary below the accepted standards of the profession in the area.*

[7] Section 11(c) prohibits engineers from both soliciting and submitting such price information (F. 30, *id.* at 1206).

[8] The accuracy of this advice is illustrated by the following example: In 1971, the Tri-State Airport Authority in Huntington, West Virginia, following the traditional method of hiring an engineering firm for services in extending a runway, was told in negotiation that the price would be $500,000. The Authority, believing that this price was excessive, then sought competitive bids from the five best qualified firms; three responded, and the Authority contracted the job for $300,000 (F. 56, 61, *id.* at 1210, 1211).

[9] The court of appeals summarized NSPE's efforts to frustrate the Department of Defense's experimental competitive bidding program as follows:

> * * * [P]requalified engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a

NSPE has also coordinated and encouraged the efforts of its state societies to investigate and punish those who compete in price (389 F. Supp. at 1196). Although the disciplining of members for violations of Section 11(c) is primarily the responsibility of the state societies, NSPE has recommended enforcement procedures and assisted state societies in conducting their investigations (*id.* at 1196, F. 52-53, 56-69, *id.* at 1210-1212).[10]

NSPE is also a member of the Committee on Federal Procurement of A-E Services ("COFPAES"), a membership committee of national architectural and engineering societies formed around 1967 to promote the position of its member societies that the selection of architects and engineers by agencies of the federal

selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure. [Pet. App. A-9 - A-10; see also F. 46-51, *id.* at 1208-1210]

[10] After the Tri-State Airport Authority successfully obtained competitive bids which reduced engineering fees from $500,000 to $300,000 (see n. 8, *supra*), NSPE held an investigation of the incident in coordination with several state societies (F. 62-69, *id.* at 1211-1212).

government should be made without competitive bidding or other forms of price competition (F. 43, 389 F. Supp. at 1208).[11] During the period from the formation of COFPAES to at least October 1971, all COFPAES member societies had ethical prohibitions upon price competition by their individual members in the sale of A-E services (F. 45, *id.* at 1208). In 1972, two of these societies signed consent decrees which prohibit limitations on competitive bidding or the submission of price quotations by their members. *United States* v. *American Institute of Architects*, 1972 Trade Cas. ¶ 73,981 (D. D.C.); *United States* v. *American Society of Civil Engineers*, 1972 Trade Cas. ¶ 73,950 (S.D. N.Y.).

2. In December 1972, the United States filed a civil complaint alleging that Section 11(c) of NSPE's Code of Ethics and the enforcement thereof violated Section 1 of the Sherman Act. After a lengthy trial, the district court held that Section 11(c) constitutes a form of price fixing and is thus illegal *per se* because it "prohibits defendant's members from engaging in any form of price competition when offering their services" (*id.* at 1200). It has "as its purpose and effect the excision of price considerations from the competitive arena of engineering services" (*ibid.*).

[11] In addition to NSPE, the membership of COFPAES includes the American Institute of Architects, Consulting Engineers Council, American Institute of Consulting Engineers, American Society of Civil Engineers, and the American Road Builders Association—Engineering Division (F. 44, *id.* at 1208).

The court noted that, although Section 11(c) bars the disclosure of fee information, it permits the disclosure of the state society's recommended fee schedule, the undercutting of which is a violation of Section 9(b) of the Code (389 F. Supp. at 1200).[12] Thus "[t]he ban narrows competition to factors based on reputation, ability, and a fixed range of uniform prices" (*ibid.*). The court held that the prohibition against competitive bidding "is on its face a tampering with the price structure of engineering fees * * * an agreement to restrict the free play of market forces from determining price; to sacrifice freedom in pricing decisions to market stability," and thus *per se* illegal under Section 1 of the Sherman Act (*ibid.*). Finally, the court held that, although some states prohibit fee bidding by engineers, NSPE's price-fixing cannot be justified as required by state action since its Code, applicable nationwide, is merely a private agreement "formulated outside the command and supervision of a state agency" (*id.* at 1201).

On reconsideration of its decision, following remand by this Court (see p. 3, *supra*), the district court noted that "[i]n determining that the fee schedule in *Goldfarb* constituted a price fixing practice," this Court had emphasized "the nature of the restraint,

[12] The court stated that the legality of the fee schedules was not an issue in this case, but that "insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant" (*id.* at 1200, n. 3).

the enforcement mechanism, and the fee schedule's adverse impact upon consumers" (404 F. Supp. at 457, 460). Guided by this Court's analysis in *Goldfarb*, the district court reiterated its findings with respect to these three aspects of NSPE's ban on competitive bidding and held that "the combined character, enforcement, and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" (*ibid.*).

The court held that, like the minimum fee schedule in *Goldfarb*, NSPE's bidding ban is "not an advisory measure," but rather, "an absolute prohibition on price competition among defendant's members," which they actively enforce and to which they uniformly adhere (*ibid.*). The court also emphasized that the ban "operates 'on its face [as] a tampering with the price structure of engineering fees' " which, "[s]ince engineering services are indispensable to almost any construction project and since alternative sources (*e.g.*, non-licensed professional engineers) are nonexistent," prevents the consumer from making "an informed, intelligent choice" (*ibid.*).[13]

In unanimously affirming, the court of appeals rejected NSPE's contention that its broad ban on competitive bidding was justified as necessary to avoid dangers to the public. The court held that it has been

[13] The court rejected as without merit the "defendant's contention that by awarding costs of $100 to NSPE, the Supreme Court held NSPE to be the *substantive* 'prevailing party' within the meaning of 28 U.S.C. § 2412." (*id.* at 459, n. 2.)

"both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A-12), without regard to "the sophistication of the purchaser, the complexity of the project, or the procedure for evaluating price information" used by the purchaser (Pet. App. A-9). As such, the court held that it was fairly identified as a "price-sustaining mechanism" which "at its core 'tampers with the price structure' " and thus is *per se* unlawful (Pet. App. A-12).

The court approved the district court's decree except insofar as the decree required that NSPE publicly state that competitive bidding is not unethical (Pet. App. A-12-A-13). The court found that in light of the breadth of the competitive bidding ban and NSPE's "implacability" in enforcing it, "the district court was fully justified in granting * * * broad injunctive relief" (Pet. App. A-10).

The court held, however, that compelling NSPE to state judicially ordered ideas as its own opinion encroached on NSPE's First Amendment rights[14] (Pet. App. A-12). The court ruled that prohibiting NSPE from stating that competitive bidding is unethical and requiring it to publish a statement that its prior ruling has been rescinded in light of the court's decision, would satisfy the purposes of the Sherman Act. The case was remanded with instructions to modify the decree in this respect.

[14] The United States does not contest this holding.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and raises no issue warranting further review.

1. A. The court of appeals and the district court properly concluded that on this record, NSPE's comprehensive ban on competitive bidding operated to prevent price competition and as a consequence constituted a *per se* violation of the Sherman Act. There is no reason for this Court to consider further the factual determinations of the two courts below.

Section 11(c) of the NSPE Code tampers with the price structure of the engineering business in a fundamental way. As the district court found, it "prohibits defendant's members from engaging in any form of price competition when offering their services" (389 F. Supp. at 1200), and though it does not set prices at a specific uniform level,[15] it restricts "the free play of market forces from determining price" and "sacrifice[s] freedom in pricing decisions to market stability" (*ibid.*). These findings, which NSPE does not challenge here, are dispositive. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508. As the court of appeals correctly observed: "the absolute rule is fairly identified as a price-sustaining mecha-

[15] As indicated *supra*, n. 6, another provision of the NSPE Code, Section 9(b), deters members from undercutting the state or local society's list of suggested prices (389 F. Supp. at 1200).

nism * * * that at its core 'tampers with the price structure,' and * * * [is] therefore illegal without regard to claimed or possible benefits" (Pet. App. A-12; footnote omitted).[16]

Petitioner's contention (Pet. 15-17) that the lower courts here refused to consider the evidence and examine Section 11(c)'s ban on competitive bidding in

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[16] Combinations or conspiracies among competing sellers to fix prices or otherwise tamper with the price structure of the markets in which they sell have long been condemned as so damaging to competition that no alleged justification for their existence will be considered by a court; they are unreasonable restraints as a matter of law. *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 489; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218-228; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392. Price is the "central nervous system of the economy" and any agreement among competitors that tampers with the price structure is unlawful *per se*, *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 226, n. 59. Pleas that the restraint is reasonable or necessary to protect the public are not considered. *United States* v. *National Association of Real Estate Boards*, *supra*; *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 467-468; *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 220-222.

The offense of price fixing encompasses more than just an agreement to fix prices at specific levels. It covers agreements to raise, depress, fix, peg or stabilize prices as well. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221-223; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211; cf. *United States* v. *Container Corp. of America*, 393 U.S. 333. It is the act of tampering with price competition which is the essence of the offense. "The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy [*i.e.* price competition] against any degree of interference." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221.

the context of its purpose and effect is incorrect. The court of appeals expressly found that the district court had "assessed the rule by taking into account how it had operated in fact, and with what practical anticompetitive consequences" (Pet. App. A-7 - A-8). The district court made detailed findings concerning the nature and operation of NSPE's bidding ban within the context of engineering practices, and concluded that NSPE and its members actively policed adherence to the ban with the intent and effect of eliminating price considerations as a competitive factor in the field of engineering services. 389 F. Supp. at 1196, 1200.[17]

On remand from this Court, the district court recognized and applied the factors the Court emphasized in *Goldfarb*: the nature of the restraint, the enforcement mechanism, and the restraint's adverse impact upon consumers. It found that Section 11(c) was an "absolute prohibition on price competition," rather than merely an advisory measure, which was actively enforced through a variety of mechanisms with the result that consumers were "prevented from making an informed, intelligent choice" in selecting engineering services. 404 F. Supp. at 460. On this basis, the district court found that "the combined character, enforcement and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" and adhered to its previous determination

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[17] The district court's findings are summarized at pp. 9-11, *supra*.

that Section 11(c) is illegal *per se*. 404 F. Supp. at 460-461. The court of appeals agreed (Pet. App. A-5 - A-12).

The courts below properly rejected petitioner's claim that Section 11(c) is necessary to preserve public safety (Pet. 8, 10, 22). However, those courts did

> not say or imply that there is no room in antitrust law for ethical rules of practice for the learned professions, to prevent harm to the lay consumer and general public. What we do say is that the rationalization offered by the Society does not justify the broad ban on all competitive bidding which the Society has attempted to enforce [Pet. App. A-8 - A-9].

The courts below thus recognized that antitrust law is flexible enough to allow professional self-regulatory conduct that is designed primarily to protect the public and is no more restrictive than necessary. They nevertheless correctly concluded, on the basis of the district court's findings of fact, that Section 11(c) was neither drafted nor enforced for the principal purpose of protecting public safety.

Thus, the court of appeals noted that NSPE's ban on competitive bidding "has been stolidly applied as a block governing any and all engineering services associated with the study, design, and construction of real property improvements. It does not take into account the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information" (Pet. App. A-9). It concluded

that Section 11(c) "is a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A-12).

In sum, the lower courts' rejection of petitioner's safety justification for the rule was based upon a correct statement of the law and upon findings of fact which the record amply supports.

B. Petitioner contends (Pet. 16), citing a footnote in *Goldfarb* v. *Virginia State Bar*, *supra*, 421 U.S. at 788-789, n. 17,[18] that private agreements among "professionals" to reduce price competition between themselves are not subject to the traditional *per se* rule against price fixing, and should be assessed by the rule of reason. It is mistaken.

The district court in *Goldfarb* held that defendants' fee schedules were a form of price-fixing and hence

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[18] This footnote states:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

illegal *per se*. 355 F. Supp. 491, 493-494 (E.D. Va.). This Court affirmed that finding, concluding that "respondents' activities constitute a classic illustration of price fixing." 421 U.S. at 783. The Court did not evaluate the restraint under the rule of reason or instruct the district court to make such an evaluation on remand, despite arguments by the defendants in *Goldfarb*, like those of NSPE here, that the restraint was necessary to prevent cost cutting that would result in "cheap, though faulty" professional work and therefore should be judged under a rule of reason analysis.[19]

The *Goldfarb* footnote[20] simply reserves judgment on the proper analysis of competitive restraints, other than price fixing, by professionals. The reference to the "public service aspect" of the professions does not intimate that attempts by professionals to eliminate price competition is to be treated differently from such attempts by others.

C. Petitioner also contends (Pet. 26-28) that the previous action of this Court (422 U.S. 1031), va-

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[19] See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, *supra*, Brief For Respondent Fairfax County Bar Association, pp. 34, 53-55; Brief on Behalf of Respondent Virginia State Bar, p. 16.

[20] The fact that footnote 17 appears in the portion of the *Goldfarb* decision which considered the question of whether the "professions" were exempt from the antitrust laws rather than in the portion of the decision in which attorney price fixing was found to be a "classic" Section 1 violation supports the conclusion that *Goldfarb* does not require a special legal rule for price fixing by professionals.

cating the judgment of the district court and remanding the case for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, *supra*, required reconsideration of the Society's restriction under the rule of reason. This assertion, which amounts to a claim that this Court reversed on the merits, was correctly rejected by the courts below (Pet. App. A-8; 404 F. Supp. at 459 n. 2), and is nothing more than a reformulation of petitioner's contention, refuted above (pp. 17-18), that under *Goldfarb* its price-fixing activities are to be tested under the rule of reason (Compare Pet. 16-17, with Pet. 27).

As shown above (pp. 15-16), the district court on remand, as well as the court of appeals, carefully reconsidered the case in the light of *Goldfarb*. See Pet. App. A-7 - A-12; 404 F. Supp. at 459-461. A lower court's adherence to its previous decision following remand by this Court for reconsideration in light of a significant intervening precedent is neither unusual nor erroneous. See, *e.g.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 379-380 (vacating and remanding the decision below, in part, for reconsideration in light of *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508); on remand, *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.) (previous findings and conclusions adhered to after consideration of *Trucking Unlimited*); affirmed *per curiam*, 417 U.S. 901.

On the basis of the district court's findings as to the broad nature of the restraint, the court of appeals correctly held that cases permitting, in other

limited contexts, narrowly defined restrictions that may potentially affect price (*e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231) were inapplicable here (Pet. App. A-11). The district court twice carefully considered and analyzed the purpose and effect of NSPE's proscription of price competition in terms of its actual operation and practical competitive impact, and the court of appeals, after a comprehensive analysis, agreed. The assessments of these courts fully meet the standards enunciated in *Goldfarb* and do not raise issues warranting further review.

D. Petitioner also asserts that because various governmental bodies have decided not to rely on competitive bidding for procurement of engineering services, NSPE's ban on competitive bidding is "reasonable as a matter of law" (Pet. 17-20). This assertion reflects a fundamental misconception concerning the Sherman Act's prohibition against agreements in restraint of trade. Individual purchasers may choose to forego competitive bidding. Under the Sherman Act, however, sellers, may not, by collective agreement, deprive purchasers of competitive options. Thus, while local authorities, state officials and the Congress may eschew competitive bidding in specified circumstances, such decisions neither authorize nor command nationwide imposition of these policies by private agreement. *United States* v. *Socony-Vacuum Oil Co., supra.*[21]

[21] This Court specifically rejected arguments similar to NSPE's in *United States* v. *Socony-Vacuum Oil Co., supra.* In

E. Contrary to petitioner's claim (Pet. 20-22), the decision below does not conflict with decisions of other circuits. The cases petitioner cites involve refusal to extend the *per se* rule, *i.e.*, to apply it to a practice for the first time or to practices that this Court has ruled should be judged under the rule of reason.[22]

that case, price fixing was held to constitute a *per se* violation of Section 1 of the Sherman Act despite "[t]he fact that the buying programs [involving the price fixing] may have been consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act * * *." *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 227-228. The Court held that only "specific Congressional authority," which the program lacked could save it from *per se* illegality. *Id.* at 226 and see 225-227. Section 11(c) has no such "specific Congressional authority."

While the Brooks Act (40 U.S.C. (Supp. II) 541-544), relied on by petitioner (Pet. 17-20), does not require competitive price bidding on certain federal procurements of engineering services, Congress made it clear that enactment of this legislation would not "limit the operations of the Department of Justice in the application of our antitrust laws." H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 6 (1972).

[22] In *Evans* v. *S.S. Kresge Co.*, 544 F. 2d 1184 (C.A. 3), and *Moraine Products* v. *ICI America, Inc.*, 538 F.2d 134 (C.A. 7), certiorari denied, No. 76-391, November 8, 1976, the courts applied the rule of reason to antitrust claims based on restrictive provisions in trade name and patent licenses, respectively. Each court found that it was confronted with a matter of first impression and, on that basis, declined to apply the *per se* doctrine. 544 F.2d at 1192; 538 F.2d at 138. In *Evans* v. *S.S. Kresge Co., supra,* the court also found that the parties were not competitors. In *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368 (C.A. 5), the court found, contrary to petitioner's description of the case (Pet. 21), that no tying arrangement existed. 549 F.2d at 376-378. Only after reaching that conclusion did the court decline "to

None of the cases involved an attempt by competitors directly to eliminate price competition, a practice traditionally condemned as *per se* illegal.

2. Petitioner's claim that portions of the district court judgment, even as modified by the court of appeals, violate the First Amendment (Pet. 23-25) is insubstantial.[23] The decree [24] properly reflects and implements the district court's findings that NSPE had secured adherence to the illegal agreement by extensive publicity among its members concerning the supposedly unethical nature of price competition.

The gravamen of the violation involved neither political nor commercial speech. NSPE was not simply articulating views on social policy in the hope of persuading its members independently to decide, free from the fear of sanction, to refrain from competitive price bidding. NSPE here promulgated and enforced an "ethical" rule which coerced members to avoid price competition. An injunction against such conduct infringes no First Amendment rights, for as this Court has held (*Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502):

> * * * [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. * * * Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

See also *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 101 n. 5.

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add approved-source requirements to the list of *per se* violations." 549 F.2d at 379. *Mackey* v. *National Football League*, 543 F.2d 606 (C.A. 8) and *Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646 (C.A. 5) involved situations in which the courts refused to apply a standard of *per se* illegality to rules on player transfers and quarter horse registration requirements because of the necessarily interdependent relationship between the competitors involved. 543 F.2d at 619; 552 F.2d at 652.

Quality Mercury, Inc. v. *Ford Motor Co.*, 542 F.2d 466 (C.A. 8), involved a vertical territorial restriction, subject to a rule-of-reason analysis under this Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, No. 76-15, decided June 23, 1977. *Response of Carolina, Inc.* v. *Leasco Response, Inc.*, 537 F.2d 1307 (C.A. 5), also involved vertical territorial restrictions, as well as an alleged tie-in which the court found the evidence did not establish.

[23] Petitioner never made its First Amendment argument to the district court, although it had ample opportunity to do so. At oral argument on November 7, 1975, it stated in passing that it wanted a hearing "on the form and content of the decree" (Tr. 51). Although the district court did not decline to hold such a hearing, petitioner never followed up the matter, either in the ensuing three weeks leading to entry of judgment, or thereafter.

[24] The judgment of the district court is reproduced at Pet. App. A-15 - A-20. The portion of the opinion of the court of appeals modifying the decree is set forth at Pet. App. A-12 - A-13. The United States does not contest this modification. The judgment has not yet been amended to reflect the modification the court of appeals ordered.

Paragraph VII of the judgment (Pet. App. A-17), of which petitioner specifically complains (Pet. 23), does no more than is necessary to prevent a recurrence of petitioner's numerous and widespread activities which publicized and enforced its illegal agreement. *United States* v. *Gypsum Co.*, 340 U.S. 76, 88-89. It bars NSPE from adopting or disseminating a rule or guideline which prohibits or discourages members from submitting price quotations for engineering services or states that such price competition is improper. It is in accord with decisions of this Court holding that an injunction in an antitrust judgment may place restraints on expression or association in order to prevent repetition of Sherman Act violations. *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508, 514; *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.), affirmed *per curiam*, 417 U.S. 901.[25]

The other portion of the judgment challenged (Pet. 24), Paragraph VIII (Pet. App. A-17 - A-18), requires appellant to publicize the judgment, by printing and distributing copies to old and new members and, as modified by the court of appeals, by publishing "an advice that its prior ruling has been rescinded in light of the court's decree" (Pet. App. A-13). This Court has upheld such a publication requirement.

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[25] See also: *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226; *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616-618; *Associated Press* v. *United States*, 326 U.S. 1, 19-20; *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376.

Lorain Journal Co. v. *United States*, 342 U.S. 143, 155-158.[26]

Petitioner's argument (Pet. 24) that the judgment contravenes rights assured by *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, is also wide of the mark. *Noerr* and *Pennington* establish that the antitrust laws do not prohibit appeals to a governmental body designed to engender anticompetitive governmental action. No part of the allegations or proof in this case, however, involves attempts by NSPE to influence the official action of a governmental body. And nothing in the judgment prevents NSPE from so doing.[27] NSPE and its members may communicate their views to state or federal officials and attempt to influence those officials to act in particular ways.

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[26] The decree upheld by the Court in that case contained the following provision (342 U.S. at 158):

> Commencing fifteen (15) days after the entry of this judgment and at least once a week for a period of twenty-five weeks thereafter the corporate defendant shall insert in the newspaper published by it a notice which shall fairly and fully apprise the readers thereof of the substantive terms of this judgment and which notice shall be placed in a conspicuous location.

[27] Indeed, the only mention in the judgment of government officials is Paragraph VIII's requirement that NSPE send copies of the judgment "to each State Board of Engineering Registration in the United States" (Pet. App. A-17).

The decree is a carefully shaped remedial measure designed effectively to redress the antitrust violation found and to prevent future violations. As the court of appeals said, "[t]he case as it stands presents a Society whose program had been one of all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree" (Pet. App. A-10). A judgment that did not accomplish complete termination of the violation and prevention of its renewal would have been inadequate. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323-325; *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401; see also *United States* v. *Gypsum Co., supra*, 340 U.S. at 88-89.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 76-1767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

This case does *not* involve price fixing. It involves a principle of professional ethics which extensive uncontroverted evidence showed to be reasonable and in the public interest. The courts below held that consideration of that evidence was barred by the *per se* rule.

In Point 1A of its Brief [1] the Government argues that the rule of reason does not apply here because NSPE's ethical canon is unreasonable in operation. In Point 1B of its Brief,[2] the Government argues that the *per se* rule applies here because the ethical canon is price-fixing.

The first of these contentions is question-begging. The second is name-calling.

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[1] Brief for the United States in Opposition at 13-17.

[2] *Id.* at 17-18.

To advance its first contention, the Government argues that the lower courts considered the reasonableness of the ethical provision "in terms of its actual operation and practical competitive impact." [3] The lower courts, by their own account, did no such thing. The District Court, having determined to apply the *per se* standard, stated that "the Court's inquiry is ended and it need not consider the reasonableness of the ethical proscription." [4] The Circuit Court, having determined to affirm use of the *per se* standard, stated that "There was no need for the district court to embark on protracted findings on matters that it considered, in the last analysis, to be unavailing as a defense." [5] Thus, no Government argument can establish the converse of this fact: The lower courts in this case explicitly rejected consideration of the evidence of reasonableness.

To support its second contention—that this is a price fixing case and hence *per se* applies—the Government asserts that the lower courts found price fixing here. But what did the lower courts actually find? The District Court did *not* find, nor could it, that this case involved the exchange of prices among competitors in any way. What the District Court concluded was that "In order to be characterized as price fixing . . . it need only be established that the suspect conduct acts to restrain free price movement." [6] The Circuit Court perfunctorily affirmed that analysis.[7] We ask this Court to consider, in deciding whether to hear the case, these questions:

—Is an ethical injunction against supplying a diagnosis without prior client consultation "price fixing"?

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[3] *Id.* at 20.

[4] 389 F.Supp. at 1199; *see also*, 404 F.Supp. at 461 (on remand).

[5] Appendix to Petition for Certiorari ("Cert. App.") at A-8.

[6] 389 F.Supp. at 1199.

[7] Cert. App. at A-11.

—Does an ethical principle against fee bidding for professional work before the facts on which the fee must be based are known illegally "restrain free price movement"?

—Is a professional society which asserts such principles a "price fixer"?

—Is it *per se* illegal to promulgate ethical principles regarding solicitation of professional engagements?

—Are professional ethics regarding methods of solicitation presumptively unlawful under the antitrust laws? If so, is the presumption irrebutable under the *per se* rule?

—Should the courts apply an irrebutable presumption of illegality under the *per se* rule in a case of first impression without considering the evidence of record relating to reasonableness and justification?

—How can any professional ethics be promulgated or maintained without judicial consideration of their reasonableness when attacked?

The Government Brief addresses none of these questions, but simply and expediently seeks to portray this as a price fixing case. Essentially, the Government Brief substitutes the epithet "price fixing" for legal analysis, and reduces the term "price fixing" from a specific antitrust offense to a rhetorical device, or slur.

To foster the erroneous impression that this case involves price fixing, not ethical standards, the Government Brief refers to fee schedules and to Section 9(b) of NSPE's Code of Ethics, neither of which is at issue here and neither of which is even mentioned in the complaint. Beginning long before this Court's decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and continuously thereafter, NSPE has stated to both lower courts at every opportunity that it does not now nor has it ever had a fee schedule, that it makes no defense of

fee schedules, that it does not defend anyone else's fee schedule, and that it is perfectly amenable to relief which prohibits it from acting with respect to fee schedules. NSPE's attorneys have stated to attorneys for the Government since before this case was submitted to the District Court, and continuously to date, that NSPE will not be baited into defending fee schedules in any way. But instead of permitting the case to go forward on the issue of principle for which it was defended—whether ethics which prohibit bidding before the facts can be known are *per se* illegal—the Government persists in trying to paint this as a fee schedule case. That portrayal evades the issues presented, and amounts to guilt by association with others who do have fee schedules.

Similarly, the Government Brief erroneously asserts that NSPE has "enforced" the ethical canon.[8] However, the alleged "enforcement," even as the Government characterizes it, consisted of distributing educational "pamphlets to members and customers," publishing "interpretations of the Code in the NSPE magazine," making public "speeches," [9] and exhorting Government agencies.[10] (Indeed, NSPE exhorted Government agencies to do precisely what Congress has commanded them to do.)[11] Since when do these palpably legitimate exercises of basic First Amendment rights constitute "enforcement" of a "price-fixing conspiracy"? Is public debate of an issue equivalent to illegal "enforcement" of one's beliefs? Why, when it discusses so-called "enforcement," does the Government Brief fail to mention that the District Court found that "no person has ever been expelled from *or in any way disciplined* by NSPE for engaging in" fee bidding? [12]

[8] Brief for United States in Opposition at 6.

[9] *Id.* at 6-7.

[10] *Id.* at 8.

[11] *See* Petition for Certiorari at 17-20.

[12] 389 F.Supp. at 1214 (emphasis added).

In drafting its Brief, the Government was aware of this Court's recent decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, —— U.S. ——, 45 L.W. 4828 (June 23, 1977), repudiating the indiscriminate use of *per se* in antitrust cases. Thus, in contrast to its formulation of the issue in its Circuit Court brief (whether the NSPE canon is "a *per se* violation of Section 1 of the Sherman Act"),[13] the Government's Brief to this Court does not refer to "*per se*" in its formulation of the question presented, but suggests more generally that NSPE's ethical canon "violates" the Sherman Act.[14] The Government appears to back away from full defense of the exclusionary *per se* rulings of the lower courts in this case.

The Government Brief's reformulation of the antitrust issue presented; its retreat from *per se;* and its unsupportable, last-minute suggestions that the lower courts did in fact consider the evidence of reasonableness, are all understandable in light of the Court's opinion in *Continental T.V.* After quoting with favor Chief Justice Hughes' statement that in antitrust matters "Realities must dominate the judgment. . . . The Anti-trust Act aims at substance" (*Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360, 377 (1933)), and after favorably noting its decision in *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963) ("We need to know more than we do about the actual impact of these arrangements. . . ."), the Court in *Continental T.V.* said this:

> Since the early years of this century a judicial gloss on [Section 1 of the Sherman Act] has established the rule of reason as the prevailing standard of analysis. . . . *Per se* rules of illegality are appropriate only when they relate to conduct that is mani-

[13] *National Society of Professional Engineers* v. *United States*, No. 76-1023 (D.C. Cir.), Brief for the United States of America at 1.

[14] Brief for the United States in Opposition at 2.

festly anti-competitive. [45 L.W. at 4831 (citation omitted).]

The Government Brief, like the lower court opinions in this case, lost sight of the origin and the purposes of the *per se* concept, described by this Court in *Continental T.V.* In so doing, the Government and the lower courts disregarded the injunction of this Court in *White Motor Co.*: "We need to know more. . . ." The tragedy of the instant litigation is that, in five years of legal proceedings involving this case of first impression, the judiciary has never addressed or made any findings with respect to the record evidence regarding the evils of fee bidding in engineering. The courts "need to know more" before they finally refuse to weigh that evidence.

Throughout the litigation, the Government previously argued that NSPE's prohibition of fee bidding is *per se* illegal because, allegedly, it indirectly bears on pricing. Now the Government concedes for the first time that "restrictions that may potentially affect price" may in some circumstances be properly judged under the rule of reason.[15] In that regard, the Government cites *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), in which the Court upheld as reasonable the absolute fixing of commodity prices during hours the commodity exchange was closed.[16] However, the Government Brief does not provide any guidance as to what distinguishes price-related arrangements which are to be measured by the *per se* rule from those to be measured by the rule of reason. We suggest that prohibitions—like those involved in *Chicago Board of Trade* and here—which regulate the time at which prices may be quoted, in order to promote safe and orderly commerce, are to be measured by the

[15] *Id.* at 20.

[16] In *Chicago Board of Trade*, this Court noted the Government's contention that the case involved price fixing; the Court applied the rule of reason. Justice Brandeis' opinion called the Government's characterization "a bald proposition." 231 U.S. at 238.

rule of reason. Conversely, agreements which establish the prices which competitors will charge should be measured by the *per se* rule.

The ethical prohibition on fee bidding at issue here in no way regulates the price a client is charged, nor does it limit a client in selecting an engineer. Rather, the ethical provision relates exclusively to the time an engineer may properly quote a fee: after he has preliminarily learned the facts in consultation with the client, who has selected the engineer subject to unlimited fee negotiations thereafter. Should the client and the initially-selected engineer fail to reach a fee arrangement, the client is entirely free to look elsewhere.

The Government Brief also conspicuously omits reference to the Court's recent decision involving professional ethics, *Bates and O'Steen* v. *State Bar of Arizona*, —— U.S. ——, 45 L.W. 4895 (June 27, 1977). There the Court held that (1) the Arizona Supreme Court's imposition of a prohibition against all advertising by lawyers is not subject to Sherman Act attack, and (2) appellants' First Amendment rights were infringed by the State Bar's prohibition of their advertisement of routine legal services. Noting that it was not called upon "to resolve the problems associated with in-person solicitation of clients," 45 L.W. 4899, this Court concluded that the particular advertisement before it would not adversely affect professionalism. *Id.* at 4900. The Court's holding was carefully limited to advertisements of "routine" legal services, *id.* at 4901, such as "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. . . ." *Id.* According to the evidence in the instant case which the lower courts refused to consider, in professional engineering there is no counterpart to such routine legal services as the foregoing; each engineering assignment is necessarily unique. *See* Petition for Certiorari at 4-5. More fundamentally, the lower courts in the instant case, unlike this Court in

Bates and O'Steen, struck down an ethical principle relating to solicitation of professional services which no one even argues are routine: design of nuclear power plants, skyscrapers, air bases, stadiums, and the like. Further, the courts enjoined any advocacy of the principle. This, NSPE contends, is incompatible with the principle expressed in *Bates and O'Steen*.

II.

The last time it came before this Court in this case, on its Motion to Affirm, the Government contended that the judgment herein was perfectly consistent with the First Amendment.[17] Now the Government's Brief "does not contest" [18] the Circuit Court's finding that the decree violates the First Amendment in certain respects, but the Government contends that the abridgement of NSPE's First Amendment rights is not pervasive, as NSPE contends, and does not warrant review.

Examination of the judgment itself demonstrates that, contrary to the Government's Brief, NSPE would be enjoined from ideological speech by its entry. To cite one illustration, the judgment would enjoin NSPE from contending that the relief in this case is "contrary to the public interest." [19] The judgment would enjoin NSPE from "implying" that fee bidding is unprofessional.[20] The judgment would prohibit NSPE from publishing articles whose purpose was to persuade public officials to adopt legislative policies.[21]

The Government Brief erroneously asserts that NSPE did not raise its First Amendment contentions in the Dis-

[17] *National Society of Professional Engineers* v. *United States*, No. 74-872, Motion to Affirm at 15-16.

[18] Brief for The United States in Opposition at 24.

[19] *See* Petition for Certiorari at 23-24.

[20] *Id.*

[21] *Id.*

trict Court on remand. To the contrary, not only did NSPE submit to the District Court its Supreme Court briefs on that point,[22] it also specifically asked for a hearing on it. However, the request for a hearing was not granted, and the District Court instead again rubberstamped the judgment originally offered by the Government's attorneys, without changing a single word.

III.

The Government Brief suggests that NSPE should be treated severely because it did not acquiesce in a consent decree as have other professional societies recently pursued by the Government.[23] Indeed, the Government Brief cites such consent decrees,[24] although it is axiomatic that they have no precedential value.[25] Similarly, the Circuit Court opinion states that the Society's "all-out resistance to the lawsuit" justifies the breadth of the decree,[26] and the Circuit Court opinion suggests that a "decree more limited in its objectives and restraints" [27] would have been more appropriate had the Society not vigorously asserted its defense in the courts. Thus are defendants in civil antitrust cases brought by the Government warned that if they dare to state a defense in court and take appeals, these facts will be cited against them as justifying overbreadth of the judgment entered. Such endorsements of Governmental coercion should not

[22] *E.g.*, *National Society of Professional Engineers* v. *United States*, No. 74-872, Jurisdictional Statement at 23: "6. The final judgment abridges NSPE's First Amendment rights by prohibiting NSPE from expressing or advocating a policy it considers essential to the public safety and welfare."

[23] Brief for the United States in Opposition at 9.

[24] *Id.*

[25] *See* 15 U.S.C. § 16(a) (Supp. V 1975).

[26] Cert. App. at A-26.

[27] *Id.*

be ratified by this Court. The doctrine stated by the Circuit Court is itself an abridgement of the right of free speech as well as of due process.

IV.

As antitrust law now stands, the rule of reason applies to restraints involving bidding for professional football players' services (*Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976)), and the *per se* rule applies to bidding for professional engineering services. Nothing in the Government's Brief suggests a resolution of this unseemly situation and the conflict between the circuits, or shows why the Court should not review this case. Only this Court can guide the professions now.

Respectfully submitted,

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September 22, 1977

IN THE

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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November 17, 1977

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Circuit Court's opinion herein (per Judges Wright, Tamm and Leventhal), dated March 14, 1977, is reported at 555 F.2d 978. It also appears in the Appendix to the Petition for Certiorari at A-2.[1] The first District Court

[1] The Appendix to the Petition for Certiorari is cited in this brief as "Cert. App." The Joint Appendix in the Court of Appeals, which is the Appendix herein pursuant to the Court's Order dated November 7, 1977, is cited as "J. App." Government exhibits are cited as "GX", defendant's exhibits as "DX". GX 1-439 were offered in evidence at J. App. 1581-84; DX 1-215 were offered at J. App. 1594.

opinion herein, dated December 19, 1974, is reported at 389 F. Supp. 1193 (J. App. 9928). The District Court entered judgment on December 31, 1974 (J. App. 9974), from which National Society of Professional Engineers ("NSPE") appealed directly to this Court. On June 23, 1975, this Court, as reported at 422 U.S. 1031 (J. App. 9984), unanimously vacated the District Court judgment, awarded costs to NSPE, and remanded for further consideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). On November 26, 1975, the District Court reinstated its judgment without modification. Cert. App. A-15-A-20. The second District Court opinion, of that date, is reported at 404 F. Supp. 457 (J. App. 9985). On December 4, 1975, the District Court denied NSPE's application under 15 U.S.C. § 29 (1970) for permission to appeal directly to this Court. Cert. App. A-14. The Circuit Court affirmed the District Court judgment except to the extent the Circuit Court held NSPE's First Amendment rights were infringed thereby.

JURISDICTION

The Court of Appeals judgment was entered on March 14, 1977. Certiorari was sought by Petition filed June 10, 1977. The Petition was granted on October 3, 1977. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the rule of reason governs application of Section 1 of the Sherman Act to an ethical principle of a learned profession in a case of first impression when there is substantial record evidence of reasonableness.

2. Whether an ethical principle of a learned profession which states the same policy regarding procurement of professional engineering services as stated in United States statutes and regulations, and state statutes, regulations and judicial decisions, is reasonable, and thus not illegal, under Section 1 of the Sherman Act.

3. Whether the judgment herein, which prohibits Petitioner from stating facts or views or advocating a policy Petitioner believes essential to the public interest and safety, abridges Petitioner's First Amendment rights.

4. Whether this Court's prior mandate herein required the District Court to consider the record evidence of reasonableness of the ethical principle at issue.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

The Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II 1972) provides:

> § 542. Congressional declaration of policy.
>
> The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.
>
> * * * *

§ 544. Negotiation of contracts for architectural and engineering services.

(a) The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services rendered, the scope, complexity, and professional nature thereof.

(b) Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.

(c) Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

Numerous other United States and state statutes and regulations, set forth in the Appendix to the Petition for Certiorari at A-21-A-50, and in the Appendix herein at J. App. 3415-5477, prescribe the same policy against obtaining professional engineering work by bidding as that set forth in the Brooks Act and in NSPE's Code of Ethics.

STATEMENT

This is a Government civil antitrust case in which the District and Circuit Courts held the ethical principle against soliciting engineering work by "competitive bidding" set forth in Section 11(c) of NSPE's Code of Ethics illegal "*per se*". A massive record of facts demonstrating not only the reasonableness but the necessity of the ethical principle was disregarded on the ground that it is "irrelevant". The lower courts thus permitted a facade of words to constitute a legally insuperable barrier to examination of the facts. But it is the facts, not the words, which are essential to rational consideration and determination of the legal issues. The facts are complex, but fully presented in the record and essentially undisputed, and are summarized in the following statement.

1. Professional Engineering is a Unique Field.

"Engineer" has many meanings, the most familiar of which have no bearing on this case. To some, the term signifies the person in charge of the engine on a railroad train; or the custodian who operates a boiler, and fixes faulty light switches in hotels and offices. Such meanings have nothing to do with this case.[2]

"Engineer" as used in this case refers only to the "professional engineer", practitioner of a learned discipline involving application of science to the solution of problems in the service of society.[3] This is an individual who has studied advanced mathematics, statics, dynamics, materials and stresses; fluid mechanics, solid mechanics, computer science, design theory and specialized structures. These and many other subjects are studied, by the problem-solving method, before the engineering student even begins to study his field of specialty.[4] His practice

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[2] J. App. 1114. Citations to the Joint Appendix are illustrative, not exhaustive.

[3] J. App. 1098.

[4] J. App. 916-27.

may be in civil, mechanical, electrical, biomedical, environmental, structural, or numerous other specialties.[5] Engineering, the profession of applied science, requires knowledge of the most recent, recondite and complex principles of science.[6] It also requires the imagination, intelligence and persistence to apply those principles to solve unique problems relating to construction or production of useful structures and artifacts.[7]

The professional engineer is much like the scientist, with this difference: Scientists seek knowledge for its own sake and serve no client; whereas engineers employ the knowledge and methods of science to solve problems presented by clients.[8] In this respect, engineering and medicine have been termed "professions in essence", as they pursue knowledge to improve practice, and their essential nature is to deliver an esoteric service.[9]

Professional engineering's story is the untold story of modern industrial society. Popular history books record the names of the brilliant scientists who discovered basic principles of physics, chemistry and biology—Newton, Darwin, Faraday, Mendel, Curie, Einstein, Fleming and others. But science's discoveries are of only intellectual significance until developed and applied to social use by engineers. To choose but one of thousands of examples: penicillin when discovered by Fleming was a mere laboratory curiosity, of possible use to no more than a few patients a year. Only later, when engineers devised means to produce it in large quantities and under rigorous quality control, did penicillin become a "miracle" drug.[10] Nearly

[5] J. App. 94-95, 327-28, 914, 1098-99, 1777.

[6] J. App. 470, 941.

[7] J. App. 1096-99, 1777, 1974-75.

[8] J. App. 583-85, 1974-75.

[9] J. App. 610-12, 941-42, 944-46, 1096-98, 1777, 1970-71, 1974-75.

[10] J. App. 1986.

every useful structure and artifact of contemporary industrial civilization is the product of engineering, utilizing science's principles and discoveries.[11] To confirm this, one need only observe the contemporary landscape's skyscrapers, automobiles, hospitals, school buildings, airplanes, telephones, computers, waterworks, sewage systems, broadcast stations, and factories. Professional engineering's role in society is pervasive, unique, essential, and yet generally unnoticed.

Engineering shares with other learned professions, such as medicine and law, the characteristics of possessing a body of specialized and organized knowledge, a group of practitioners, an established intellectual discipline, and traditional ethical principles.[12] In one respect, however, engineering differs from other professions. Medicine and law are oriented toward processing individuals' cases: curing the individual patient, or counselling and representing the individual client. Engineering, on the other hand, deals with construction, or manufacturing, for wider use. Architects may design houses for individuals; engineers generally do not. Engineers design office buildings, factories, power plants, hospitals and the like, each of which immediately affects a population—and usually a large population—rather than an individual.[13] Engineers also design products, but with rare exceptions such design is of a prototype to be replicated many times in manufacturing, and not of a single artifact for use by an individual.[14]

As a result of these facts, the consequences of error, inadequacy and malpractice in engineering are generally greater than in medicine or law. The responsibility of a

[11] J. App. 43, 130-32, 364-66, 602-02, 680-85, 1104-05, 1253-56, 1506, 1969-70, 1984-89.

[12] J. App. 582, 1220-21, 1436, 1975-76.

[13] J. App. 1984-89.

[14] J. App. 2098-99.

physician or lawyer is profound; and failure by either may grievously injure or destroy a patient or client. But an engineer's error or inadequacy can result in collapse of a building or bridge, epidemic, contamination of a community's water or food supply, or other public injury or disaster.[15]

2. Professional Engineering Deals With Unique Problems.

Clients come to engineers, as they generally do to physicians and lawyers, when they have problems. But there is a difference in the nature of problems presented to the professions. While in law, and presumably medicine, every client's problems are somewhat different than those of anyone else, certain categories of problems can be characterized as "routine", or substantially similar from case to case.[16]

However, no two problems presented to a professional engineer by his clients are ever the same.[17] Every engineering problem is unique in important respects.[18] Although, to a layman, one office building may appear similar to another, there are always essential differences—the location of the buildings; their proposed uses and functions; the clients' needs and resources; applicable legal requirements; soil conditions; climate; availability of materials; and dozens of other variables.[19] Designing the most simple structure requires analysis of more than a dozen interdependent systems, each of which comprises numerous interdependent elements, and all of which must be coordinated to solve the client's problem.[20] Basic elements in a very simple structure include, for example, building layout, size, number of floors, utility services and sources, transportation, siting and environmental impact, soil requirements, framework, exterior surface, fenestration, load bearing, ceilings, illumination, power source and load, heating and cooling, plumbing, waste disposal, fire protection, roofing, stairways, elevators, communications, hardware, security, and many others.[21] Thousands of permutations and combinations of elements figure in the most simple structure.[22] More complex projects present more elements and many more possible combinations and choices. In a project as relatively simple as a community hospital, there is no finite limit on the number of options the engineer must identify and evaluate.[23]

Engineers are able to solve the problems presented to them, and to make compatible choices among the almost limitless number of available options, by learning the client's specific needs and matching them against the available options; eliminating some options by choosing others; and using technical knowledge and informed judgment to narrow, then expand, and ultimately to narrow the range of choices. Adequate engineering is dependent on that combination of knowledge, intelligence and imagination called "creativity".[24]

Engineering problems are invariably unique; solutions of prior engineering problems are often instructive, but never dispositive.[25] It is not possible to draft specifications for an engineering assignment before consulting the engineer to deal with the problem.[26] Clients come to

[15] J. App. 364-66, 1027-28, 1046-47, 1252-54, 1283-84, 1389.

[16] *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691, 2703 (1977).

[17] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[18] *Id.*

[19] J. App. 1613 *et seq.*

[20] *Id.*

[21] J. App. 1613, 1620.

[22] J. App. 1624-25.

[23] J. App. 1625.

[24] J. App. 366-71, 937, 1624-25, 1784-85, 1990-92.

[25] J. App. 1999.

[26] J. App. 377, 410, 963, 1158, 1222, 1227-28, 3075, 3349, 3385.

professional engineers with problems, not projects, and clients usually cannot even articulate the problems, no matter how simple, in engineering terms.[27] For example, it might appear to the layman that a sewer line extension would involve repeating the engineering design employed to lay the original line. However, as every engineer knows, safe design of the extension must be based, at a minimum, on analysis of soil borings and topography, and consideration of the effects of the addition upon the existing system. Even design of a short, "simple" sewer-line extension often poses entirely different problems than those encountered in designing the original line.[28] The record establishes that engineering deals with unique problems.[29]

3. The Principle of Selection By Competence Developed Out of Clients' Practical Needs, and Concern for the Public.

In engineering, as in other learned professions, standards of propriety have developed pragmatically, over many years, out of the nature of the work.[30] In the development of the method of selecting engineering talent, a basic consideration has been the economic relation among the different stages of the project. The first stage is identification and preliminary analysis of, and development of a conceptual approach to, the problem. The next is engineering design. Plans and specifications produced by engineering design are then transmitted, often to construction firms invited to bid to construct the structure according to the design. After the structure is constructed, it is occupied and operated for the purpose for

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[27] J. App. 176-77, 227-29, 366, 948, 1717, 1991.

[28] J. App. 74-76.

[29] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[30] J. App. 595-96, 641, 1443-46, DX 40 at 207.

which designed.[31] Years later, it may be torn down and replaced.

Engineering design costs are a fraction of total project cost: Construction costs average thirteen times design costs; maintenance costs average six times design costs; operating costs average at least eighty times design costs; and life-cycle costs average more than one hundred times design costs.[32]

Although engineering design costs are a tiny fraction of project costs, optimum design is indispensible to economy and efficiency at all subsequent stages of the project.[33] For example, bidding at the construction stage absolutely depends on the adequacy of the engineer's design, plans and specifications.[34] If the plans and specifications contain ambiguities or other inadequacies, construction firms bidding will not be offering the same structure, but rather their own versions or interpretations.[35] Ambiguous or otherwise inadequate plans and specifications lead to disputes between client and constructor, changes in the bid amount. and cost overruns.[36] Thus, inadequate engineering in structure design wastes economic and physical resources, by increasing construction, maintenance, and operating costs, and decreasing the structure's functional efficiency.[37] Adequate engineering conserves economic and physical resources by decreasing construction,

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[31] J. App. 1612 *et seq.*, 1999 *et seq.*

[32] J. App. 171-72, 378-79, 1146-47, 1223, 1280, 1628-29, 1631-32, 3398.

[33] J. App. 1106-07, 1109, 1150-52, 1223-24, 1283, 1629-31, 1994-95, 2003-05.

[34] J. App. 1027, 1223-24, 1628-31, 1994-95, 2003-05.

[35] J. App. 950-51, 1026-27, 1226-28, 1630-31, 1996-97.

[36] J. App. 950-51, 1026-27, 1226-28, 1630-31, 1994-95.

[37] J. App. 1106-07, 1109, 1150-52, 1223-24, 1283, 1629-31, 1994-95, 2003-05.

maintenance, and operating costs, and increasing the structure's functional efficiency.[38] Adequate engineering design thus saves clients money.[39]

The difficulty of obtaining adequate engineering design of structures is compounded by the fact that acquainting the engineer sufficiently with the client's problem to permit preparation of a conceptual solution is a substantial part of the entire design engagement.[40] Extensive communication between client and engineer, and the client's disclosure of confidential data, are required for the engineer to perceive the problem adequately and tentatively propose a design concept that will satisfy the client's need.[41]

Since the total cost of engineering design is a very minor part of the total cost to the client, and the adequacy of the design makes a very substantial difference in the total cost to the client, it has become obvious over the years that engineers should be selected on the basis of competence, or qualifications for the specific engagement, rather than on the basis of the amount of fee that might be charged.[42]

The competence principle is fitting in engineering for an additional reason: The variety of engineering problems, and of engineers and firms with specialized qualifications and competence, are such that there always appears to be one engineer or firm best qualified to handle the specific problems of a particular client in a specific location under the particular conditions prevailing. Variations among professional engineers and firms are such

[38] J. App. 46, 1150-52, 1223-24, 1629-31, 1994-95, 2003-05.

[39] J. App. 175, 178-80, 380-81, 516, 1109, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[40] J. App. 693-94, 1456, 1613, 1626, 1665-66; DX 212 at 16.

[41] *Id.*

[42] J. App. 44-48, 175-80, 965-69, 1217-24, 1230-32, 1339-42, 1997-2005.

that no two are equally qualified for precisely the same assignment at the same time.[43]

Most fundamentally, basing selection of the engineer on his competence is predicated on the consideration, described below, that inadequate engineering design endangers public health and safety, and compromises structural integrity.

As a result of all these considerations, there has developed the "traditional method" of selecting engineers. Under that method, several professional engineers (or firms) are considered by a client with a particular problem, with a view to their possible engagement based on their prior relevant experience and performance; their professional training and reputation; their proximity; and the client's feeling of confidence or trust in each of them.[44] Under the traditional method, competence is at the very center of the process and is the principal basis of choice.[45]

Under the traditional method of selection by competence, clients typically identify design engineers by seeking advice of other engineering clients and engineers. Clients obtain detailed information from many sources as to qualifications, and consult the builders, owners, and occupants of structures designed by engineers under consideration.[46] The client then ranks engineers under consideration on the basis of his evaluation of their competence, taking into account all relevant elements, and then makes an *initial, tentative* selection based on competence and qualifications.[47]

[43] J. App. 252-58, 510, 512, 782, 962-64, 1697, 3347-48.

[44] J. App. 384-86, 1718, 3347-48, 3417, 6711.

[45] J. App. 384-86, 1148-49, 1159-65, 1169, 1646, 3347-48.

[46] J. App. 384-86, 1642-43, 1718, 6717.

[47] J. App. 44-45, 54-55, 59-60, 72-73, 384-86, 781-82, 1006-07, 1126-27, 1148-49, 1163-65, 1236, 1639-43, 1718, 1782-83, 3347-48, 3417, 5485, 6717.

After the client has made an *initial, tentative* selection of an engineer on the basis of competence, the engineer generally spends one or two weeks, or more, locating and reviewing all available information about the prospective client's problem, learning the client's view of the assignment's scope, and discussing the client's needs with him.[48] The engineer then engages in time-consuming analysis of the problem and formulates a preliminary conceptual solution.[49] Engineer and prospective client continue to discuss the scope of the assignment, the client's needs, and the tentative conceptual engineering solution to the client's needs, until fundamental agreement is reached as to how best to proceed.[50] During these discussions engineers are free to provide, and frequently do provide, fee-related information, such as hourly billing rates for engineers who may be assigned, overhead costs, and historical data concerning fees charged in previous matters of comparable scope and complexity.[51]

When engineer and prospective client have reached tentative agreement as to the scope and nature of the structure and assignment, the client then addresses the method by which a fee shall be determined.[52] Frequently used methods of calculating engineering fees include payroll costs times a multiplier; costs plus a fixed fee; lump sum fees; per diem rates; percentage of construction costs; and combinations of these methods. NSPE recommends against use of the percentage of construction cost method, but makes no recommendation among any of the other methods, and does not attempt to prevent use of any method.[53]

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[48] J. App. 231, 447-48, 512, 804.

[49] J. App. 231, 396-97, 804, 1152-53, 1643-45, 1702-03.

[50] J. App. 227-32, 704, 801-02, 1643-45.

[51] J. App. 384-86, 1122, 1148-50, 3347-48, 3417.

[52] J. App. 397, 473, 705, 1374.

[53] J. App. 234, 378, 478-79, 704-05, 708, 799-801, 1790-95, 5480-93.

After the client has specified the method by which the fee should be calculated, he and the engineer engage in negotiations as to the amount.[54] These negotiations may be vigorous and extensive. *If the client is dissatisfied with the fee proposed or the fee negotiations, he is free to choose another engineer and negotiate with a second, third, or any number of engineers,* until the client is satisfied with the understanding he has reached with an engineer of his own choice.[55]

4. The Principle of Selection by Competence As an Ethical Matter Is Limited to Situations Where Required by Public Interest.

The principle of selection by competence has proved so advantageous to clients and the public that it has generally been followed. Situations have, however, arisen in which a prospective engineering client has sought a fee proposal before any engineer is fully informed as to the nature of the work involved. The question has arisen whether an engineer can ethically submit a fee bid in such circumstances. Since it is true in engineering, as in law and other disciplines, that general principles do not by themselves decide specific cases, NSPE has a Board of Ethical Review ("BER") to interpret and apply the ethical principles approved by NSPE.[56]

In a series of opinions, the NSPE Board of Ethical Review has held that the principle of selection by competence and against bidding applies where the public would be endangered by disregard of the principle. This is illustrated by an early limitation on the principle, in which BER held the principle not to apply to research and development ("R & D") contracts.[57] BER observed

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[54] J. App. 438, 801-02, 1158-59, 1181, 1375.

[55] J. App. 1783.

[56] J. App. 712-13, 1763-64, 1950, 2508-09.

[57] J. App. 2599-2600.

that R & D projects are essentially contracts to produce a prototype.[58] Prototypes are thoroughly tested and examined before the product involved is manufactured for, sold to or used by the public.[59] Accordingly, when the engineering assignment is for research leading to production of a prototype, there is much less danger that inadequate engineering will result in injury to the public, for there is opportunity to test for flaws and correct errors before the public is exposed to the product.[60] By contrast, in design of buildings, bridges and similar structures, there can be no prototype.[61]

Over the years five major limitations upon the ethical principle have become recognized: R & D contracts; study contracts; "turnkey", or combined design and construction, contracts; sub-professional or non-professional work; and work not leading to an improvement to real property.[62] The rationale in each situation is the same—the procedure of bidding, when applied here, threatens little or no danger to the public.[63]

In study-contract work, the client is purchasing a specified amount of engineering effort. Although the effort may be directed toward solution of a problem, design will not directly result. The engineer will merely furnish data which may be used—or disregarded—if and when the client desires a structure or product to be designed.[64]

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[58] *Id.*

[59] J. App. 1790, 1873-74.

[60] J. App. 1790.

[61] J. App. 2600.

[62] J. App. 962, 1631-32, 1788-90, 2549-50, 2551, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2790-91.

[63] *Id.*

[64] J. App. 1788-89.

"Turnkey", or "design-construct", work is construction work performed by firms which employ their own professional engineers. Typically, ninety-five percent of the cost of such projects is construction cost and five percent engineering cost. There is no incentive to limit the engineering work to an inadequate amount since the design-construct firm, as well as its client, will benefit from the economies and efficiencies of fully adequate engineering design.[65]

Sub-professional, or non-professional, contracts occur when an engineering firm offers services or equipment ancillary to engineering design work. For example, an engineering firm offers photogrammetric services, and owns an aircraft specially equipped for this service. BER has said that such firm may ethically bid to obtain rentals of the aircraft. BER's opinion stated: "The purpose of 11(c) is to prevent the furnishing of professional services on a basis which will or could lead to inferior performance in an area which involves the public health or safety by placing reliance on a low bid as distinguished from qualification for and quality of services rendered. This danger, which is real in the case of professional design services related to physical structures, is nonexistent or minimized to a point of no consequence when related to the furnishing of material or equipment."[66] Consequently, BER said, there is no ethical basis for refusing to bid for the rental of equipment such as aircraft, computers, and the like.[67]

Finally, there is an overriding limitation on the scope of the ethical principle. The principle, as stated in NSPE's Code of Ethics, is limited to engineering involv-

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[65] J. App. 1789.

[66] J. App. 2788.

[67] J. App. 2789.

ing design of improvements to real property.[68] The reason for this limitation is the same as for the other limitations—R & D, study contracts, turnkey projects, and non-professional work: risk to the public can be minimized to a point of no consequence with respect to all engineering design work except work relating to structural improvements to real property.[69] Structures constituting improvements to real property, whether factory buildings, bridges, hospitals, waterworks or nuclear power plants, are built only once, according to the design. Real property improvements are not first built in prototypes that can be tested; and once built they are used by members of the public. Real property improvements are part of the environment in which we all live and, if hazardous or inadequate, expose the public to danger.[70]

5. Selection By Bidding is Inconsistent With Selection by Competence and is a Practical Impossibility and Illusion in Engineering.

"Competitive bidding" normally connotes free competition in a market economy. In ordinary usage, it means selection of a buyer or seller of a specified product or service on the basis of price proposals, and "requires that all bidders be placed on a plane of equality, and that they bid on the same terms and conditions."[71] One example is an auction, where a specified article is sold to the highest bidder.[72] Competitive bidding is commonly used in the construction industry, where fully engineered

[68] J. App. 2445.

[69] J. App. 1788-90.

[70] J. App. 106-07, 364-66, 1027-52, 1219, 1252-54, 1283-84.

[71] *Black's Law Dictionary* 356 (4th ed. 1968).

[72] J. App. 2334.

plans and specifications state the services and goods to be supplied, and bids are comparable.[73]

In engineering, "competitive bidding" has a meaning contrary to its ordinary usage. The reason is that the services an engineer is to render his client cannot be determined at the time or in the manner required by the process of bidding.[74] To determine with any reasonable degree of approximation what engineering services will be required, the engineer must extensively communicate with the client, study the client's problem and needs, analyze the available engineering options, and identify a tentative conceptual solution.[75] This must then be communicated to the client to insure that the engineer has properly ascertained the problem and is proposing to proceed in a manner acceptable to the client. One-sixth to one-third of the work required to provide adequate engineering design is consumed in the preliminary task of identifying the problem and determining a tentative conceptual solution.[76] Arriving at the best conceptual approach requires about thirty percent of the design effort; less effort is likely to be superficial.[77]

Thus, bidding as a method of selecting an engineer requires each engineer who seeks or receives consideration for selection to set a fee for his work *before*, not after, he has consulted with the client, or learned the client's problem, or proposed an approach to it.[78] At that point, the engineer is in no position to articulate

[73] J. App. 377-78, 1226-28, 1466, 1638, 2334, 3349.

[74] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 1784-85.

[75] J. App. 172, 175-80, 374-78, 395, 1025, 1152-53, 1223, 1633-34, 1638-39, 3349.

[76] J. App. 1153, 1627-28.

[77] J. App. 1152-53.

[78] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638, 1639, 3349, 6771.

an adequate design concept. Consequently, the client cannot choose among prospective engineers on any basis but price.[79] The bidding process in engineering is thus inherently inconsistent with the principle of selection by competence.

It has been suggested by persons unfamiliar with the engineering field that the client should be entitled, if he wishes, to make a selection on the basis of price before he has evaluated competence. However, selection of an engineer based on proposed fees or price for design work is not, in fact, a selection actually related to price: An engineer necessarily estimates his costs, and therefore his fees, on the basis of the nature and scope of the client's problem, the engineering approach to the problem, and the time and personnel required to produce an optimum engineering solution to it.[80] Consequently "bids" submitted in engineering, before the facts are known, can be only guesses.[81] There is no way for a client to determine what kind or amount of engineering work is included in any bid.[82] Thus, bidding in engineering, unlike in other fields, gives no assurance that the service will be obtained for the lowest price in the end.[83]

Since bids in engineering are inherently speculative, and the services to which they relate cannot be specified, the process is no more than a lottery, a sham and an illusion, with merely the form of bidding and of competition.[84]

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[79] J. App. 69, 514-15, 1154-55, 1224-28, 1251, 1648-49, 3379-80.

[80] J. App. 45, 49-51, 53, 227-32, 374, 375, 377, 395-97, 410, 447, 475, 704, 801-02, 1158, 1280, 1325-26, 1467, 1627-28, 1720, 1992, 1999, 2006.

[81] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638, 1639, 3349, 6771.

[82] J. App. 175-80, 374-77, 1152-53, 1638-39, 6771.

[83] J. App. 68.

[84] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

The argument has occasionally been advanced that competition would be served by having three or four, or more, engineering firms propose design concepts and submit these with fee bids for selection by the client. However, as the Assistant Commissioner of GSA testified, it would be wholly infeasible to have three or four firms each expend a third of the effort needed to do a complete job in order to select one.[85] Such a procedure would require expending more than 100% of the engineering effort merely to make the initial selection. No matter what economic arrangements were devised, larger, rather than smaller, engineering costs would necessarily result.[86]

While bidding in engineering is a sham, deceptive and misleading to clients, the traditional process provides competition. The client selects an engineer on a judgment as to competence, and communicates and negotiates until there is a clear understanding as to the problem's scope and the fee. Until there is a meeting of the minds, the client is absolutely free to turn to another engineer. This process has produced real competition, and the competition is increasing.[87] Moreover, apart from all economic considerations, the traditional method—selection by competence—protects public safety, as described below.

6. The Principle of Selection by Competence, Rather Than By Bidding, Is Advocated But Not Enforced By NSPE, And Is Generally Accepted By Engineers.

No one disputes that engineers are generally selected to perform design services by the principle of competence and not by bidding. This process is followed because all parties involved desire it, and not because it is required or

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[85] J. App. 1153.

[86] J. App. 380-81, 1324-25, 1657-60.

[87] J. App. 1172, 1236-37, 1733-34.

imposed by NSPE. NSPE's role is limited to education and advocacy.[88]

There are many technical societies and associations in the engineering field.[89] The one national, non-profit organization devoted to engineering as a profession is NSPE,[90] which was organized in 1934.[91] Numerous state and local societies are affiliated with NSPE, but each has its own constitution and by-laws, and NSPE has no authority to order, compel, forbid or prevent any action by any affiliated group.[92]

The ethical principles observed by engineers developed over many years, long antedating NSPE's formation. The first statement in the profession of the principle of selection by competence and not by bidding was at least as early as 1911.[93] NSPE's Code of Ethics does not create ethical principles, but merely states them. The present Code was adopted in 1964 as a restatement of several earlier codes promulgated by a number of engineering organizations.[94]

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[88] J. App. 1756-60, 1767-68, 2500, 2534, 2647, 2703.

[89] J. App. 1752-53.

[90] J. App. 1753, 1755-56, 2434.

[91] J. App. 1755, 2434.

[92] J. App. 1757, 2494-95.

[93] By 1911, the American Institute of Consulting Engineers is known to have had the following provision among its stated ethics:

> To compete with a fellow Engineer for employment on the basis of professional charges, by reducing his usual charges and attempting to underbid after being informed of the charges named by his competitor [is unethical]. [E. Heermance, Codes of Ethics 166 (1924.)]

For a discussion of early codes of ethics in the engineering profession *see* Annals of the American Academy of Political and Social Science 68-104 (May, 1922).

[94] J. App. 956-57, 1255, 1288-91, 1768-69, 1770, 1837, 1842, 2007-08, 2534.

The ethical principles stated in NSPE's Code are widely published and disseminated, and are subject to authoritative interpretation by BER, which is completely independent within NSPE.[95] BER's opinions are published in NSPE's monthly magazine, *Professional Engineer*, and in bound volumes.[96] Each published volume of BER opinions states that, since ethical principles are necessarily couched in general terms, it is desirable to supplement them with specific statements relating to actual situations.[97] Each also states that BER's purpose is educational, not punitive or disciplinary; thus, the cases it considers are reported without use of actual names. BER opinions are "offered to the profession for guidance with hope that they will serve to make the profession's ethical principles a living and dynamic force".[98]

Ethical principles of the profession are taught in the engineering schools.[99] Every practicing engineer who testified stated that he and his firm follow the principle of selection by competence, and refuse to engage in fee bidding, because this course represents sound engineering practice, and not because it is a requirement or demand of NSPE.[100]

NSPE has never made any attempt to enforce its ethical canon against bidding and has had only one factual investigation that even related to that canon.[101] That one investigation involved charges of political influence in

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[95] J. App. 712-13, 1286-87, 1291-1306, 1763-65, 1766, 1770-71, 1831, 1950-51, 2508-09, 2532-2808.

[96] J. App. 1286-87, 2508-09, 2532-2808.

[97] J. App. 2534, 2647, 2703.

[98] *Id.*

[99] J. App. 1594-95, 1707-08.

[100] J. App. 175-76, 18[illegible]72, 1673, 1706, 1999.

[101] J. App. 1767, 1786-87.

the selection of an engineer, and of a required "kick-back" or payoff to a local engineer.[102] No action was taken as a result of the investigation, and it was made clear to all participants that NSPE was not undertaking to enforce any rules or principles.[103]

No one has ever been disciplined in any way for violating the ethical canon against bidding.[104]

7. Selection of Engineers By Competence Rather Than By Bidding Is The Policy Of The U.S. Government, Most State and Local Governments, and Private Clients.

United States policy with respect to procurement of engineering services dates from 1925. That year Congress authorized the then-novel step of retaining outside engineers, providing that they would be selected "without reference to civil service requirements",[105] and "in accordance with the usual customs of their several professions." [106]

In 1939, Congress authorized securing outside engineering and architectural services, declaring in a Senate report that "it is as illogical to advertise for the services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist. . . . The question in each case should be decided upon the special qualifications of the firms under consideration." [107]

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[102] J. App. 2420-21, 2423-24, 5711, 5713.

[103] J. App. 5714.

[104] J. App. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[105] Pub. L. No. 68-463 (1925).

[106] *Id.*

[107] S. Rep. No. 263, 76th Cong., 1st Sess. 23 (1939), J. App. 3551.

Government policy as to the method of obtaining architectural and engineering ("A/E") services has been the subject of numerous Congressional hearings and reports, statutes and regulations, throughout the period since 1939.[108]

In 1972 Congress held a series of hearings on the so-called "Brooks Bill", which provided that the Government should continue to follow the traditional method of obtaining A/E services in all cases. Following hearings, the House Committee on Government Operations found, *inter alia*:

> [T]he committee concludes that the traditional system of architectural and engineering service procurement utilized by the Federal Government, as well as other public bodies, business and private industry, constitutes the most effective and efficient manner to acquire these professional services, and that regular competitive negotiation procedures not be applied to A/E procurement.[109]
>
> * * * *
>
> . . . regular competitive negotiation, where each potential contractor is pitted against the others in terms of fee and quality of his product or service, does not provide an optimum method of procuring A/E services for the Government or anyone else. Even were A/E fees reduced somewhat, the "savings" would inevitably be reflected in a reduction of the A/E's design costs rather than his projected margin of profit. This in turn means that the Government would tend to obtain lower quality plans and specifications which could mean high construction and maintenance costs and, generally, lower quality buildings and other facilities.[110]

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[108] *See* J. App. 2809-3682.

[109] H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 2 (1972), J. App. 3347.

[110] *Id.* at 4, J. App. 3349.

The Senate Committee on Government Operations similarly found that enactment of the Brooks Bill was in the public interest and would "insure the continuation of the Government's basic procurement procedure, with respect to architectual and engineering services, which has been in operation for more than 30 years." [111] The Brooks Bill was enacted into law and became 40 U.S.C. §§ 541-44 (Supp. II 1972).

Thus the Government's policy has always been to select engineers by the principle of competence rather than bidding; and this practice is required by numerous, extensive and pervasive statutes and regulations, including, for example, the Brooks Act, the Armed Services Procurement Regulations, the Federal Procurement Regulations, and the Military Construction Authorization Act.[112] Every department and agency of the United States which obtains the services of professional engineers, including the Department of Justice, follows the traditional method of selection by competence, not bidding.[113]

Likewise, the traditional method of retaining professional engineers is and has been for many years followed by state, local and regional governments and governmental bodies throughout the United States, pursuant to legislation, regulation, custom and practice.[114] Further, at least 49 decisions of state courts throughout the United States declare bidding an improper method of obtaining professional services.[115]

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[111] S. Rep. No. 92-1219, 92d Cong., 2d Sess. 6 (1972), J. App. 3398.

[112] *See* Cert. App. A-21-A-24, J. App. 3417-3682.

[113] *Id.*

[114] J. App. 1784, 3091-92, 3398, 3682-5477; DX 216.

[115] The decisions are cited at Cert. App. A-60 - A-62.

In the private sector, too, the traditional method of selecting engineers by competence rather than bidding has been followed for many years throughout the United States by engineering clients generally, including industrial corporations, schools, hospitals, and churches.[116]

8. The Record Shows Why The Principle Of Selection of Engineers By Competence Rather Than By Bidding Is In The Public Interest and Reasonable.

The record shows six principal ways in which selection by competence serves the public interest and in which, conversely, bidding on projects to which the ethical principle applies endangers the public, thwarts competency in engineering, and is unreasonable. These are:

(A) Bidding in engineering endangers life and safety;

(B) Bidding in engineering suppresses the free exchange of information necessary to the profession;

(C) Bidding in engineering frustrates and prevents competition in construction;

(D) Selection by competence tends to decrease, and bidding tends to increase, construction, maintenance, operating, and life-cycle costs;

(E) Selection by competence is the best way to secure optimum design, and bidding leads to functional inefficiency; and

(F) In engineering, bidding is inherently deceptive and fraudulent.

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[116] J. App. 388-94, 706, 1153-54, 1380, 1784, 3347, 3379, 3394.

(A) *Bidding in engineering endangers life and safety.*

The evidence is uncontroverted that there is a relationship between inadequate or negligent engineering work and the awarding of such work by bidding or fee cutting.[117] The principal executive of the insurance carrier which provides malpractice insurance for sixty to seventy percent of the professional engineers in the country testified that he keeps records of all claims of inadequate engineering work, and that he investigates and analyzes the claims. Between 1957 and 1973 there were 17,500 claims of engineering error or inadequacy, and by 1974 the insurance carrier was receiving such claims at the rate of about ten per business day.[118] Approximately 15% of all claims involved death or bodily injury,[119] which amounts to an average of more than one claim every day involving death or bodily injury. From 1957 to the end of 1973 the insurance carrier paid more than $150 million on liability claims, $23.5 million of which had been paid for death or bodily injury.[120] Actual losses were even larger, since the foregoing sums exclude amounts deductible by the insurance carrier, settlements and other payments by insured persons.[121]

Testimony identified many examples of inadequate engineering caused by bidding or fee cutting in the solicitation of engineering work. Among these are an apartment house fire in California; collapse of a partially completed building at Bailey's Crossroads; the Crystal City collapse; collapse of a Smithsonian Institution building; collapse of the Silver Bridge between Ohio and West

[117] J. App. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[118] J. App. 991, 993.

[119] J. App. 998.

[120] J. App. 1056, 1057.

[121] J. App. 1057.

Virginia (in which more than sixty persons were killed); collapse of the Tacoma Narrows Bridge; faults in the Envoy Motel in Washington, D.C.; collapse of St. Rose of Lima Church in Baltimore; the Knickerbocker Theatre collapse in Washington (which caused 90 deaths); failure of the sewer system in Ottumwa, Iowa; contamination of water systems in the Pittsburgh area; collapse of a silo in Puerto Rico; and the expense of correcting major structural faults in Wilcox Hall at Princeton University.[122]

The relationship between solicitation of engineering work by bidding and the frequency of claims arising from inadequate engineering is so well established by statistical data that the insurance carrier refuses to insure engineering firms that engage in solicitation by bidding, and excludes from insurance coverage projects on which engineers have engaged in bidding.[123]

(B) *Bidding in engineering suppresses the free exchange of information necessary to the profession.*

It is vital in the learned professions that there be free exchange of information and ideas among the profession's members.[124] This is basic to progress in science and engineering.[125] Widespread sharing of knowledge through publication in technical journals, seminars, programs of continuing education and meetings of technical and professional societies is characteristic of and indispensable in engineering.[126] Valuable information freely exchanged

[122] J. App. 1028-53, 2003 *et seq.*

[123] J. App. 1016-17.

[124] J. App. 597.

[125] J. App. 1099, 1972-74.

[126] J. App. 597-99, 1099-1100, 1459, 1490, 1752, 1971-73, 1999-2001; DX 40 at 213.

among engineers is of incalculable benefit not only to members of the profession and their clients, but also to the public and future generations.[127] Thus, engineering ethics, as stated in NSPE's Code of Ethics, include the duty to "cooperate in extending the effectiveness of the profession by interchanging information and experience with other engineers and students . . . ." [128]

On the other hand, commercial businesses profit by acquiring, accumulating and applying innovative information, methods and processes not known to their competitors.[129] Consequently, businesses tend to withhold valuable innovative information from public dissemination.[130] The law recognizes the value of such information to business, and the right of business to withhold it, in the doctrine of trade secrets.[131]

The trade secrets concept is inapplicable in engineering. Bidding in engineering would place a premium on hoarding valuable professional knowledge, as each engineer who became involved in bidding was increasingly forced to protect his economic self-interest by submitting the lowest bid.[132] Thus widespread bidding would erode the intellectual foundation of the profession, and with it the basis for much contemporary technological progress.

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[127] J. App. 1048-49, 1099, 1971-73.

[128] Cert. App. A-58, J. App. 5479.

[129] J. App. 1459, 2326.

[130] J. App. 1459, 2326; DX 40 at 213.

[131] J. App. 1469; DX 40 at 213; *see Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974); 12, 12A R. Milgrim, *Business Organizations* (1976).

[132] J. App. 1469, 1999-2001, 2326-28.

(C) *Bidding in engineering frustrates and prevents competition in construction.*

As the evidence which is summarized above shows, selection of design engineers by bidding results in inadequate, incomplete and ambiguous plans and specifications.[133] This, in turn, makes construction bids non-comparable, and engenders disputes, additional construction costs and litigation between constructors and clients.[134] Thus, insistence on the form of bidding in the selection of design engineers frustrates the reality of competitive bidding in the awarding of construction contracts.

(D) *Selection by competence tends to decrease, and bidding tends to increase, construction, maintenance, operating, and life-cycle costs.*

If the selection of an engineer by bidding to design a structure resulted in any decrease in the engineering fee (which the evidence indicates is unlikely), such decrease would be negligible compared to the inevitable increase in the structure's construction, maintenance, operating and life-cycle costs, as the evidence summarized above establishes.[135] The Architect of the Capitol and others testified that competitive bidding is an unreasonable method of selecting a professional engineer since it inevitably increases the client's project cost by an amount much greater than the engineering fee.[136]

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[133] J. App. 111-12, 370-75, 376-77, 425-31, 432-34, 948, 950-51, 1025-27, 1227, 1244, 1614, 1629-30, 1633, 1638, 1990-96; DX 9-14.

[134] J. App. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

[135] J. App. 48, 172, 173, 368, 379-81, 526-28, 951, 965-68, 1106-07, 1109, 1122, 1151, 1187-88, 1223-24, 1231-32, 1238-39, 1241, 1281, 1626, 1629-31, 1646-47, 1785, 3348-49, 3398, 3406, 3410, 6709-10, 6714-15; *see also* note 32, *supra*.

[136] *Id.*

(E) *Selection by competence is the best way to secure optimum design, and bidding leads to functional inefficiency.*

One witness with impeccable credentials to establish that the best way to secure optimum engineering design is through the traditional method is the United States Government. The Government has vast experience in this matter. After making findings as to the advantages and benefits of this method on the basis of extensive hearings,[137] Congress declared it Government policy "to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required . . . ." 40 U.S.C. § 542 (Supp. II 1972). Congress prescribed by statute the specific means of engineering procurement known as the traditional method. *See* 40 U.S.C. §§ 543-44 (Supp. II 1972).

As the Senate Committee on Government Operations found:

> The Committee on Government Operations is always concerned with the element of cost in all Federal endeavors. In this instance, the committee feels that the Government's interest, which is the public interest, is best served by placing the emphasis on obtaining the highest qualified architectural and engineering services available. . . Failure for any reason to provide the highest quality plans and specifications may well result in higher construction costs, a functionally inferior structure, or troublesome maintenance problems.[138]

[137] J. App. 2810-3038, 3100-3345.

[138] S. Rep. No. 92-1219, 92d Cong., 2d Sess. 6 (1972), J. App. 3398.

The House Committee on Government Operations found, similarly, that bidding in the engineering field would "adversely affect the quality of . . . design." [139]

The Assistant Commissioner of GSA, in charge of procurement of all non-military engineering services for the Government, testified in this case that selecting engineers by bidding would not only lower the quality of services and raise the cost of construction and life-cycle costs, but would also decrease the functional efficiency of structures and result in danger to the public.[140] Others testified similarly.[141]

The record thus establishes that, apart from economic and public safety considerations, the very purpose of procuring professional engineering design services is frustrated by a bidding procedure, since bidding in engineering leads to functionally inefficient design. The purpose of engineering design—to provide a functionally optimal structure—and the principle of selection by competence are thus corollaries.

(F) *In engineering, bidding is inherently deceptive and fraudulent.*

To seek bids on an engineering design problem prior to the consultation, communication and negotiation with the client that is a part of the traditional method is like asking a physician to make a diagnosis before he has had a chance to examine the patient, or asking a lawyer to give a legal opinion before he has had the opportunity to consult the client and learn the facts of the case.[142]

[139] H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 4 (1972), J. App. 3349.

[140] J. App. 1151-52.

[141] J. App. 44-48, 175-80, 965-69, 1217-24, 1230-32, 1244, 1339-42, 1997-2005.

[142] J. App. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

A competent and ethical professional will not opine until he has consulted the client and learned the facts. In engineering, preliminary consultations and communications—which may be brief in many medical and legal situations—are always extensive.[143]

Bidding necessarily results in an entirely different arrangement than the normal professional one between engineer and client.[144] The normal relationship involves an undertaking by the engineer to design a structure which will meet the client's needs. Where bidding is involved, the engineer undertakes to provide a certain amount of work limited by the fee specified.[145] This is appropriate only when the work is R & D, or an engineering study, or the like; and, for that reason, such types of work are outside the principle against bidding, as shown above.[146]

All of the foregoing considerations led the Vice President of Catholic University, former Dean of its Engineering School and Chairman of the District of Columbia Board of Registration for Professional Engineers, to testify that the principle against solicitation of engineering work by bidding is inherent in the profession.[147] Engineers know that when an engineer is selected on the basis of a low fee bid, the amount bid is really immaterial and a kind of bait. Once the engineer has begun the project he can take refuge in the fact that the work to be performed was not specified,[148] and can provide

[143] J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

[144] J. App. 1656-57, 2002.

[145] *Id.*

[146] J. App. 1789-90, 1873-74, 2599-2600.

[147] J. App. 2007.

[148] J. App. 1227-28.

wholly inadequate designs,[149] or demand higher fees from the client for providing adequate designs, or otherwise take advantage of the client.[150] It is not the NSPE Code of Ethics that is most influential in preventing engineers from soliciting work by bidding but the fact that, in the context of design engineering, "competitive bidding" is neither competitive nor true bidding but rather an inherently unprofessional and fraudulent practice.

9. The Procedural History of the Case Shows That The Government Relied Upon *Per Se* Because There Was No Evidence Of Unreasonableness.

This case was started by a complaint filed December 5, 1972, charging that NSPE engaged in unreasonable restraint of trade, in violation of Sherman Act Section 1, by adopting, publishing and distributing a Code of Ethics Section 11(c) of which prohibited members "from submitting competitive bids for engineering services."[151] The complaint also alleged that NSPE members abide by that section of the Code, and that NSPE and its members "police" that provision. No other section or provision of the Code of Ethics was mentioned in the complaint, and no other restraint of trade was charged.

NSPE filed its answer on January 8, 1973.[152] The answer denied the restraint of trade and admitted that NSPE had adopted, published and distributed a Code of Ethics containing Section 11(c), which was set forth verbatim. The answer also alleged as separate defenses that NSPE does not regulate or control, or seek to regulate or control, the conduct of professional engineers or

[149] J. App. 178-80, 1150-52, 1635-36, 2003-05.

[150] J. App. 1239-41.

[151] J. App. 11 *et seq.*

[152] J. App. 16 *et seq.*

others,[155] and that Section 11(c)'s provisions are reasonable and necessary to public health, safety and welfare.[154]

During the ensuing year and a half, Government attorneys engaged in extensive discovery throughout the country. They were given unlimited access to NSPE's files and records, and inspected more than ten thousand NSPE documents.[155] They issued twenty-two notices of depositions, but did not actually take any depositions, rather collecting by subpoena voluminous documents from thirteen state engineering societies, and numerous engineers and engineering firms.[156] NSPE took the depositions of twelve individuals—two authorities on occupational sociology and ten eminent professional engineers.[157]

Stipulations as to the authenticity of documents were made, and it was agreed that deposition testimony was

[154] J. App. 20-21.

[155] J. App. 21-22.

[156] J. App. 1570.

[157] J. App. 1-10, 1536.

[157] NSPE deposition witnesses:

Professor Everett C. Hughes, a founder of the field of occupational sociology, J. App. 555 *et seq.*;

Joseph Lawler, chief executive of a prominent environmental engineering firm, J. App. 319 *et seq.*;

Milton Pikarsky, Chairman of the Chicago Transit Authority and for a decade Chicago Commissioner of Public Works, J. App. 27 *et seq.*;

Louis Bacon, chief executive of a prominent structural engineering firm, J. App. 92 *et seq.*;

Dr. Robert Seamans, Jr., President of the National Academy of Engineering and former Secretary of the Air Force, J. App. 1070 *et seq.*;

William R. Gibbs, partner in a prominent engineering firm, and a member of the NSPE Board of Ethical Review, J. App. 1263 *et seq.*;

James Shivler, president of a prominent engineering firm and President of NSPE, J. App. 655 *et seq.*;

Walter A. Meisen, Assistant Commissioner for Construction

[continued]

to be used in lieu of calling a witness at trial. Trial was held June 5-11, 1974.[158] The Government's opening statement at trial asserted that ". . . the primary feature of plaintiff's case is that this case is governed by the *per se* rule which prohibits all price fixing conspiracies no matter what the context may be."[159]

NSPE's opening statement pointed out that neither price fixing nor *per se* is mentioned in the complaint;[160] that the principal defense is that the ethical principle attacked is reasonable, necessary and in the public interest;[161] and that NSPE's Code of Ethics is hortatory, not mandatory, and protected by the First Amendment.[162]

The Government case-in-chief consisted entirely of documentary exhibits.[163] NSPE then stated that it did not object to going forward with the evidence, although it believed the Government had not proved a case, but that it did not waive the rule that the Government has the burden of proof.[164] NSPE then offered the deposition testimony of twelve witnesses, and 215 exhibits.[165] NSPE

[footnote 157 continued]

Management and Public Building Service for the General Services Administration, J. App. 1135 *et seq.*;

George M. White, Architect of the Capitol, J. App. 1203 *et seq.*;

J. Sprigg Duvall, president of a liability insurance company, J. App. 974 *et seq.*;

Professor J. Neils Thompson, professor of engineering and Director of the Balcones Research Center at the University of Texas at Austin, J. App. 887 *et seq.*;

Professor Ernest Greenwood, sociologist eminent in the field of occupational sociology, J. App. 1413 *et seq.*

[158] J. App. 1529-2409.

[159] J. App. 1537.

[160] J. App. 1544, 1569.

[161] J. App. 1545-1564, 1567-1568.

[162] J. App. 1564-1565.

[163] J. App. 1578-1584, 1591-1593.

[164] J. App. 1576-1577.

[165] J. App. 1594.

then presented the additional testimony of four distinguished professional engineers.[166]

At the conclusion of the NSPE testimony the Government stated: "The Government has placed its case on the record. It relies on the documents offered in its direct case to prove the *per se* unreasonableness of the restriction charged in the complaint." [167] The Government proceeded to call three "rebuttal" witnesses: a manufacturer,[168] an engineer who is a Government employee,[169] and an economist employed in the Antitrust Division of the Justice Department.[170] NSPE presented a consulting economist in surrebutal.[171] The court then directed each side to prepare proposed findings.[172]

On December 19, 1974, the District Court filed its opinion.[173] The attorneys then visited the Judge infor-

[166] NSPE witnesses at the trial were:

Admiral John G. Dillon, who had been in charge of U.S. Navy engineering procurement for years, J. App. 1597-1682;

James L. Polk, a professional engineer engaged as a sole practitioner, J. App. 1682-1737;

Paul H. Robbins, a professional engineer with practical experience who is Executive Director of NSPE, J. App. 1741-1957;

Dr. Donald E. Marlowe, Vice President of Catholic University, former Dean of the Engineering School and Chairman of the District of Columbia Board of Registration for Professional Engineers, and recipient of innumerable honors in engineering, J. App. 1958-2031.

[167] J. App. 2049.

[168] *Richard Horner*, who had several Government appointments but who is not an engineer, J. App. 2049-2050, 2057.

[169] *Richard Hirsch*, a professional engineer employed as a teacher at the U.S. Naval Academy, J. App. 2149, 2151-2152.

[170] *Richard J. Arnould*, J. App. 2210-2211.

[171] *Dr. Nevins Baxter*, a former member of the economics faculties at Princeton and at Wharton School of Finance and Commerce at the University of Pennsylvania, J. App. 2318-2398.

[172] J. App. 2406-07, 2409.

[173] 389 F. Supp. 1193, J. App. 9928.

mally and the Government presented its proposed judgment. NSPE objected that the judgment was far too broad, and the Judge indicated that he thought some of the provisions proposed were unnecessary and went too far. The Judge asked Government counsel if the Government would permit the proposed judgment to be modified or some of the proposed provisions to be omitted. When the Government attorney refused to agree to any modification, the Judge said that the judgment would be entered as proposed since the Government as the prevailing party was entitled to the judgment it desired. No record of these proceedings was made. On December 31, 1974, the District Court filed findings of fact and conclusions of law,[174] and the judgment drafted by Government counsel.[175] The findings were comprised entirely of findings proposed by the contending parties and were so denominated by the District Court. No independent findings were made by the District Court and no finding was made as to reasonableness, nor was any of the evidence on this subject discussed in the District Court opinion.

NSPE immediately filed a notice of appeal to this Court.[176] The Government filed a motion to affirm, arguing that a *per se* case had been made. On June 23, 1975, this Court vacated the judgment and remanded the case for further consideration in light of *Goldfarb*.[177] Upon remand the District Court held oral argument. The Government argued that the remand was purely routine and that *Goldfarb* supported application of the *per se* rule. NSPE argued that *Goldfarb* called for consideration of

[174] 389 F. Supp. at 1201, J. App. 9944.

[175] J. App. 9974.

[176] J. App. 9982. The appeal was taken under the former Expediting Act, 15 U.S.C. § 29 (1970).

[177] *National Society of Professional Engineers* v. *United States*, No. 74-872, 422 U.S. 1031 (1975), J. App. 9984. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

the evidence of reasonableness in this case, and further specifically requested that if the Court decided to hold for the Government, NSPE be granted a hearing on the form of the judgment. On November 26, 1975, without further proceedings, the District Court filed its opinion, concluding that "the court adheres to its previous decision holding Section 11(c) of Defendant's Code of Ethics to be a *per se* violation of § 1 of the Sherman Act." [178] Simultaneously it re-entered the judgment previously entered and vacated.[179]

On December 3, 1975, NSPE filed notice of appeal to the Court of Appeals.[180] The case was briefed and argued, and on March 14, 1977, the Court of Appeals for the District of Columbia Circuit filed an opinion [181] which is now before this Court.

Throughout the exhaustive trial and appeals in this case the Government has contended, and both lower courts have held, that evidence of reasonableness is irrelevant. However, this claim was not advanced until the eve of trial, after the Government had completed a nation-wide investigation of engineering lasting a year and a half. The Government has not hesitated to attempt to expand the scope of the claims made in the complaint,[182] but it has made no attempt to prove the one charge explicitly made—that the ethical principle at issue is unreasonable.

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[178] 404 F. Supp. 457, 461, J. App. 9985, 9990.

[179] Cert. App. A-15, J. App. 9991.

[180] J. App. 10,000. The appeal was taken to the Circuit Court after the District Court declined to certify direct appeal to this Court. Cert. App. A-14.

[181] 555 F.2d 978, Cert. App. A-2.

[182] The Government has, over NSPE's objections, offered as exhibits fee schedules of other organizations, despite the continued and consistent position of NSPE that it does not have any fee schedule, does not desire to have or approve any fee schedule and does not defend fee schedules.

SUMMARY OF ARGUMENT

I. The rule of reason in restraint of trade cases dates from the 17th century, and has remained the prevailing standard of judicial analysis to the present day. *See especially Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 374 (1711); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977). In *Chicago Board of Trade, supra*, the Court stated two basic antitrust principles: (1) that price-related agreements among competitors which restrain trade are lawful if they regulate the time, place and manner of competition in the public interest, whereas such agreements are unlawful if their purpose is to fix the level of prices; and (2) that the courts must ordinarily examine the history, purpose and effect of an alleged restraint, in its factual context, to determine whether it violates the Sherman Act.

"*Per se*" is a term first used by the Court in a restraint of trade case in 1940, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. The term applies only to "pernicious" conduct lacking "any redeeming virtue." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). In the instant case of first impression—which involves professional ethics and arises on a massive record on the issue of reasonableness—there is no warrant for purposefully declining, as the lower courts explicitly did, to consider whether the ethical principle is required by compelling public interests. In holding that they "need not consider" the evidence of reasonableness, *see* 389 F. Supp. at 1199, and in declining to make any findings on the issue, the lower courts did not do justice. Instead, they elevated judicial administration to a higher priority than public safety. Voluminous record evidence, which the lower courts would not consider, establishes that public safety is directly imperiled by the unethical practice involved.

No defense is asserted that abolition of the ethical principle would cause "ruinous competition" among engineers. Rather, the defense rests on the record evidence, which establishes that fee bidding to get an engineering assignment, before the facts can be known, pervasively endangers the public and harms clients. The lower courts do not say otherwise. A profession's ethical canon cannot rationally be judged without examining the evils against which the canon aims. Where, as here, a principal evil involved is hazardous engineering, the urgency of examining the facts is compelling.

II. United States statutory policy dating from 1925, and continuing to the present day, with periodic reaffirmations by Congress and the Executive, prohibits procurement of design engineering work by bidding. *See, e.g.*, 40 U.S.C. §§ 541-44 (Supp. II 1972). NSPE does not contend that the Government's statutes and regulations bar subject matter jurisdiction here or comprise an exemption from the Sherman Act—even though they state precisely the policy attacked in this case. NSPE contends that the Government's continuing requirement, after 52 years of experience, that engineers not be retained by bidding, and Congress' findings that bidding in engineering harms the public, cannot properly be disregarded, and establish that an ethical canon which says the same thing is not unreasonable.

The policy of virtually every State which has acted on the subject is also identical to NSPE policy at issue. State courts, too, have condemned the unethical practice. Statutes and regulations are the standard of reasonableness as a matter of law. *See, e.g., Martin* v. *Herzog*, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (Cardozo, J.).

III. Precedents and common sense establish that the burden of proving unreasonableness in a Sherman Act Section 1 case is on the plaintiff (here, the Government); otherwise, there would be a presumption of liability in every such case, which no court has ever held.

Although it had ample opportunity to do so, and made a massive search for evidence, the Government failed to produce any substantial evidence on the issue of reasonableness. It rested its case-in-chief without putting a single witness on the stand, and produced three rebuttal witnesses, whose testimony is its own best refutation.

Conversely, massive record evidence establishes that the ethical principle is reasonable. Undisputed evidence shows that the principle is limited in scope, applying only where public safety is directly at risk. Even if, contrary to the evidence, NSPE's formulation of the ethical principle were overbroad, the proper remedy would be to limit it to its valid scope, not to abolish it. *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691 (1977), demonstrates, if any demonstration were needed, that the judiciary is fully capable of limiting restraints on professional activities to a proper scope.

IV. The sweeping judgment in this case was first entered, without a hearing on its terms, precisely as drafted by Government counsel. After this Court vacated the District Court judgment, the District Court re-entered the judgment with no changes and again without a hearing.

On its face the judgment is an unconstitutional blunderbuss which abridges First Amendment speech, publication and associational rights. As detailed in the Argument, it prohibits NSPE, its officers, its members and every professional and technical society which is now or

may become affiliated with it, from: statement of facts, expression of views, publication of ideas, and association for advocacy of principles they believe the public interest requires. A very strong presumption of invalidity attaches to such prior restraints. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968). No effort was made here to employ the least restrictive means available. *See Linmark Associates* v. *Township of Willingboro*, 97 S. Ct. 1614 (1977); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

The judgment is also irreconcilable with the doctrine of *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), since the purported "offense" on which it claims to be based consisted of communication with public officials, and because the ethical canon at issue has always been purely hortatory.

Although the Circuit Court properly recognized that the judgment violated the First Amendment to the extent the judgment compelled those affected by it to make statements they believe offensive (*see Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)), the Circuit Court erred in failing to hold that the judgment's prior restraints are unconstitutional as well. Ironically, the First Amendment cases the Circuit Court cited hold not that compelling speech is unconstitutional, but that enjoining speech, as involved here, is unconstitutional.

The judgment's abridgements of associational rights are pervasive and unconstitutional. *See, e.g., NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Con-

gress intended the Sherman Act not to impair free association, as here.

V. This Court's vacation of the first District Court judgment and remand for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), was not a meaningless formality, as the Government contends. *See Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964). NSPE believes the Court recognized there is no way to do justice here without considering the facts. *Goldfarb* supports such consideration.

VI. The Circuit Court and the Government wrongly suggest that NSPE should be penalized for defending the case instead of submitting to judgment. The adversary system depends on stubborn defense of principles. Engineering ethics, too, require that where, as here, non-engineers have made a wrong judgment on engineering matters, engineers must point out the consequences. Engineers, who deal with facts, cannot voluntarily accept the lower court decision which, "[t]o vindicate a juridical conception . . . shut out the best possible means of information." R. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620 (1908).

ARGUMENT

I. THE RULE OF REASON APPLIES TO THIS CASE.

A. The *Per Se* Rule Applies Only To Pernicious Conduct.

Section 1 of the Sherman Act of 1890, 15 U.S.C. § 1, does not on its face distinguish between lawful and unlawful restraints of trade, stating that "every" [183] contract, combination and agreement in restraint of trade is prohibited. It was clear to Congress in 1890, however, and

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[183] As to Congress' use of the generic term, *see United States* v. *American Tobacco*, 221 U.S. 106, 181 (1911).

it remains clear to the present day, that the Sherman Act was intended to carry forward the common law of antitrust which recognized that distinction.[184] As Senator Sherman stated in Congressional debate, the Sherman Act

> does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.[185]

The leading commentator on the origins of the Sherman Act has stated:

> [T]he Sherman Act was intended to bring the body of common law on the subject within reach of the United States courts.[186]
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> . . . [I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in doing so to make use of that 'certain technique of judicial reasoning' characteristic of common law courts.[187]

Since the 17th century, the common law has recognized that, to be unlawful, restraints of trade must be unreasonable; restraints reasonably limiting the time, place or manner of commerce are legitimate; and courts must examine the factual context in which the alleged restraint operates to judge its legality. *See Rogers* v.

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[184] The Act of July 2, 1890, 26 Stat. 209, 51st Cong., 1st Sess., was enacted under the title "An Act to protect trade and commerce against *unlawful* restraints and monopolies." (Emphasis added.)

[185] *See* 21 Cong. Rec. 2456 (1890). Senator Hoar, Chairman of the Judiciary Committee, also stated that the Act "affirmed the old doctrine of the common law." *Id.* at 3146.

[186] H. Thorelli, *The Federal Antitrust Policy* 228 (1955) (hereinafter "Thorelli").

[187] *Id.* at 228-29 (footnote omitted).

Parrey, 2 Bulst. 136, 80 Eng. Rep. 1012 (1613); *Broad* v. *Jollyfe*, Cro. Jac. 596, 79 Eng. Rep. 509 (1620); *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Bunn* v. *Guy*, 4 East 190, 102 Eng. Rep. 803 (1803); *Horner* v. *Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (1831); *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64 (1874); *Fowle* v. *Park*, 131 U.S. 88 (1889).

In two 1911 cases, this Court held that the foregoing common law principles apply under Section 1 of the Sherman Act. *Standard Oil Co.* v. *United States*, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179-80; *see also Nash* v. *United States*, 229 U.S. 373, 377 (1913).[188] In *American Tobacco*, the Court stated that the rule of reason is "universal" in jurisprudence, and that not to apply it to the Sherman Act would give the statute an "unreasoning and unheard of construction." 221 U.S. at 180. The Court said,

> that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests . . . the words as used in the statute were designed to have and did have but a like significance. [*Id.* at 179.]

It was in *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), however, that the Court, in an opinion by Justice Brandeis, definitively stated the scope of the rule of reason in antitrust. At issue was the legality under Sherman Act Section 1 of a Board of

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[188] Before 1911, the Court applied the same common law principles under the Sherman Act, but with a different semantic formulation. Reasonable restraints were upheld as not being "in restraint of trade", *Chicago Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236, 252 (1905); price fixing was condemned even if the *level* of prices fixed was claimed to be "reasonable", *United States* v. *Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

Trade rule which fixed grain prices by prohibiting the Board's 1600 members from buying grain, when the Board was closed, at any price other than the closing bid that day. The Court stated that "[t]he case was rested [by the Government] on the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, *fixed prices* at which they would buy or sell during an important part of the business day, is an illegal restraint of trade." [189] The Court rejected the Government's "bald proposition":

> But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. [*Id.* at 238.]

Applying each of the foregoing factors to the Board of Trade "price fixing" rule, the Court upheld the rule as a reasonable regulation of the time, place and manner in which prices may be quoted. *Id.* at 239-41. The Court reversed the district court, which had held that the evidence as to reasonableness need not be considered. *Id.* at 239.

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[189] 246 U.S. at 238 (emphasis added). As Professor Posner has noted, the facts in *Chicago Board of Trade* involved "a classic antitrust boycott", as well as price fixing. R. Posner, *Antitrust Law: An Economic Perspective* 210 (1976).

Nine years after its decision in *Chicago Board of Trade*—and more than three hundred years after the rule of reason was first applied in antitrust—this Court held that some restraints of trade are so inherently offensive that the courts may properly decline to consider evidence offered to justify them. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), in which the Court so held, involved the exchange and fixing of prices by competing pottery manufacturers, and also a group boycott. In 1940, the Court for the first time characterized these restraints as *"per se"* illegal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150. However, as the Court has repeatedly made clear, the *per se* rule is a narrow limitation on the rule of general application, and pertains only to those restraints of trade which the courts, after considerable experience, have found "pernicious." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). Restraints, to be *per se* unlawful, must lack "any redeeming virtue." *Id.* The rule of reason continues to be "the prevailing standard of analysis" in restraint of trade cases, as it has been since the 17th century. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S.Ct. 2549 (1977).

That the instant case is a case of first impression cannot be credibly denied. This is the first Sherman Act Section 1 case to reach this Court in which the defendant has made a record that the alleged restraint is indispensable to public safety and health. This is the first case to reach this Court involving application of that statute to ethical standards in a profession. This is the first case to reach this Court involving the relation of engineering practice and bidding. This case does *not* involve price fixing. It involves the time when prices for engineering services may be freely arrived at, in arms-length transactions, to avoid deception of clients—after, not before, the facts on which the engineer's diagnosis is based can

be known. This case does not involve conspiracy, overreaching, predation or consumer abuse (no consumer complains of the ethical canon at issue), but rather a profession's long-standing repudiation of a demonstrably dangerous and shabby practice.

In this case of first impression, to hold, as did the lower courts, that the judiciary "need not consider" [190] the evidence of reasonableness—to decide the case without findings on, analysis of, or reference to that evidence—is to abrogate in one stroke three centuries of the rule of reason in antitrust. To apply the *per se* standard here is tantamount to endorsing "the unreasoning and unheard of construction" of the Sherman Act which would have prohibited the rule of reason altogether; that is what the Government urged this Court to do in *United States* v. *American Tobacco Co.*, *supra*, 66 years ago.

B. The Lower Courts Disregarded This Court's Teachings On The Rule Of Reason.

Neither the District nor the Circuit Court herein correctly perceived this Court's decisions in *Chicago Board of Trade; Northern Pacific Railway Co.* v. *United States*, *supra*; *White Motor Co.* v. *United States*, 372 U.S. 253 (1963); and *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Similarly, the lower court opinions cannot be reconciled with *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*, which was decided after they were rendered.

The essential doctrine of *Chicago Board of Trade* consists of two basic antitrust principles. The first principle is that price-related agreements among competitors which restrain trade are lawful if they regulate the time, place and manner of competition in the public interest; whereas price-related agreements among competitors which restrain trade are unlawful if their purpose is to

[190] 389 F. Supp. at 1199, J. App. 9938.

fix the level of prices. The second principle is that the courts must in the ordinary case examine the history, purpose and effect of an alleged restraint of trade, the evils against which it aims, and the factual context in which it operates, before determining whether it violates the Sherman Act. Neither of the lower courts in this case recognized either of those basic principles.

In *White Motor Co.* v. *United States*, *supra*, the Court was for the first time presented the question whether vertical territorial limitations violate Section 1 of the Sherman Act. Stating that it was confronted with a question of first impression, the Court reversed a judgment entered for the Government under the *per se* rule:

> This is the first case involving a territorial restriction in a *vertical* arrangement; and we knew too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us. [372 U.S. at 261.]
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> We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' (*Northern Pacific R. Co.* v. *United States*, *supra*, p. 5) and therefore should be classified as *per se* violations of the Sherman Act. [*Id.* at 263.]

See also Maple Flooring Mfrs. Assn. v. *United States*, 268 U.S. 563, 579 (1925) ("[T]his Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record. . . ."); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 555-56 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

Similarly, even in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), involving a lawyers' mandatory mini-

mum fee schedule which the Court described as "a classic illustration of price fixing", *id.* at 783, the Court conspicuously did not invoke the *per se* rule. To the contrary, in *Goldfarb* the Court indicated that the legality of restraints of trade must be judged on the basis of the evils against which they aim—which is at bottom a statement of the rule of reason:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. [*Id.* at 788-89 n.17.]

The Court's historic skepticism of *per se* was described as follows in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 97 S.Ct. 2549 (1977):

> *Per se* rules . . . require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens

> on litigants and the judicial system of the more complex rule of reason trials, see *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958); *United States* v. *Topco Associates*, 405 U.S. 596, 609-10, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law. [*Id.* at 2558 n.16.]

In light of these considerations, the Court in *Continental T.V.* reversed its 1967 decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365—in which it had held post-sale vertical restrictions as to customers or territories *per se* illegal—concluding that ". . . *Schwinn's per se* rule [cannot] be justified under the demanding standards of *Northern Pac. R. Co.*," 97 S.Ct. at 2558.

As Justice Brandeis observed in *Chicago Board of Trade*, the courts "ordinarily" must examine the evidence of reasonableness to determine the legality of the arrangement. 246 U.S. at 238. In the similar case presented here, the lower courts' explicit determination to disregard the evidence of reasonableness seems to have resulted from adoption of the opposite premise—that "ordinarily" reasonableness is irrelevant; that, contrary to this Court's decision in *Continental T.V.*, *per se* is "the prevailing standard of analysis." Thus, after determining that NSPE's ethical provision was somehow price-related, the District Court perfunctorily concluded that its "inquiry is ended and it need not consider the reasonableness of the ethical proscription."[191] There were no findings on the issue of reasonableness. The Circuit Court affirmed the District Court's truncated analysis, going little fur-

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[191] 389 F. Supp. at 1199, J. App. 9938; *see also* 404 F. Supp. at 461, J. App. 9989-90.

ther than to observe that the ethical canon relates to fees for services.[192]

C. The Propriety Of A Profession's Ethical Canon Cannot Be Judged Rationally Without Examining The Evils At Which The Canon Aims.

Contrary to the assertion contained in the Government's briefs in this case, there is no claim here that abrogation of NSPE's ethical rule would cause "ruinous competition" among engineers. *Cf. United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). The gravamen of NSPE's claim is entirely different from that, and is supported by massive evidence (all of it explicitly disregarded by the lower courts): that bidding in professional engineering would pervasively endanger the public and harm clients. NSPE contends, the record establishes, and no court has denied, that (1) two engineers who bid, before extensively analyzing the design problem, are bidding to provide services which cannot be rationally compared by a client;[193] (2) the submission of a bid in such circumstances—before the problem can possibly be comprehended or an adequate approach to it proposed—limits the amount and quality of analysis ultimately applied to the problem;[194] (3) bidding in engineering has materially increased the actual incidence of unsafe design, injury and loss of life;[195] (4) bidding in engineering prevents competition in construction, by depriving construction bidders of adequate specifications on which to bid, thus engendering construction bids which are not comparable;[196] and (5) bidding in engineering

[192] 555 F.2d 982, Cert. App. A-8.

[193] J. App. 410-12, 513-14, 1221-22, 1639, 1999, 3384-85.

[194] J. App. 178, 374-78, 838, 1469, 1634-36, 1647, 1657, 1931, 2005.

[195] J. App. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[196] J. App. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

inexorably drives up construction, maintenance and life-cycle costs of structures.[197]

This Court will search in vain for any refutation of the foregoing points in the record of this case, in the Government's briefs, or in the lower court opinions.

The Circuit Court affirmance of the *per se* ruling in this case cannot be reconciled with statements in its own opinion. Thus, the Circuit Court, after affirming the District Court's refusal to consider the evidence on the issue of reasonableness, asserted that the "rationalization offered by the Society" was inadequate to support the ethical canon.[198] Similarly, the Circuit Court, while affirming the exclusionary *per se* decision below, erroneously asserted that the ethical canon relates to "situations where there are no . . . dangers."[199] The Circuit Court's own statements quoted above, in addition to lacking citation to or support in the record, are plainly inconsistent with its own holding, since the Circuit Court affirmed the District Court's refusal to consider either the so-called "rationalization" for the ethical canon, or any of the dangers to which the canon is addressed. At the beginning of its opinion, the Circuit Court accurately encapsulated the defense of this case, stating, "In sum, defendant argues that a ban on competitive bidding is necessary to prevent deception and poor execution."[200] However, the Circuit Court, while holding for the Government, never stated that the ethical principle is *not* "necessary to prevent deception and poor execution"—only that NSPE's defense is irrelevant.

[197] J. App. 175, 178-80, 380-81, 516, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[198] 555 F.2d at 982, Cert. App. A-9.

[199] 555 F.2d at 984, Cert. App. A-12.

[200] 555 F.2d at 980, Cert. App. A-5.

How can an ethical rule be rationally judged without examining the evils against which it aims? Has antitrust enforcement become so mechanical and dessicated that it precludes consideration of those evils? Surely *per se*, which is essentially an irrebutable presumption of illegality, should not be applied to ethical limits on solicitation of clients, which are the "consensus of expert opinion as to the necessity of such standards." *See Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

If, as has occurred so far in this case, ethical principles can be condemned solely upon a court's conclusion that they somehow affect "free price movement",[201] such principles cannot long survive, since it is undeniable that professional ethics of every type "affect price." Ethics relating to kickbacks; maximum fees for the representation of indigents; fee-splitting; limitation of practice to areas of competence; and contingent fees are but a few examples of ethical matters which undoubtedly "affect price." [202] Moreover, since it is the fundamental object of professional ethics to inhibit practitioners from adopting, to the detriment of the public, the commercial standards of the marketplace,[203] it is reasonable to assume that virtually all professional ethics are likely to "affect price." Are they all therefore *per se* illegal?

This Court has recently applied a rule of reason, and not a *per se* analysis, to a constitutional challenge to re-

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[201] 389 F. Supp. at 1200, J. App. 9939; 555 F.2d at 984, Cert. App. A-11.

[202] In economics parlance, professional ethics have "external effects", or "externalities". J. App. 2331-32; *see generally* J. Bain, *Industrial Organization* 269 *et seq.* (2d ed. 1968); F. Scherer, *Industrial Market Structure and Economic Performance* 341 (1970). Where, as here, consumers of professional services *save money* by reason of the ethical rule (*see* note 39, *supra*), "external economies" result. *See* P. Samuelson, *Economics* 474-78 (9th ed. 1973).

[203] J. App. 1443-45, 5478-79; DX 212.

straints on solicitation by advertising in the legal profession, *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977). Neither the Government nor the lower courts have advanced any reason why a different approach should apply in this antitrust case involving solicitation by bidding in professional engineering.

D. When Public Safety Is Involved It Must Be Considered In A Sherman Act Case.

Review of Sherman Act Section 1 cases decided by this Court in the 87 years since the statute was enacted indicates that in no prior case has an evidentiary showing been made that the practice attacked is necessary to public safety and health. In considering whether, as NSPE urges, this aspect alone requires examination of evidence of reasonableness, reference to the statute's basic purpose illuminates.

The Sherman Act was not grounded in dry economic theory or academic notions.[204] To the contrary, its purpose was to safeguard and protect the "common man" [205] against the predations of vast and impersonal forms of enterprise which were developing. Thus the Sherman Act reflects "an eminently 'social' purpose",[206] not an economic theory, and is in essence the first great consumer protection statute.

It would pervert that purpose to cast aside without consideration, under the *per se* rubric—which is but a legal abstraction—actual and essentially uncontroverted evidence that the principal beneficiary of the Sherman Act—the "common man"—will be exposed to bodily harm.

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[204] Economic theory was not considered by Congress, nor were academicians consulted. "Congress considered one antimonopoly bill after another without ever asking for the advice of [economists] or any other professionals." Thorelli, *supra* note 186, at 567.

[205] *Id.* at 227.

[206] *Id.*

Litigants often make extravagant claims of horrible consequences, and courts are accustomed to examining such claims skeptically. However, the lower courts in this case were not skeptical; rather, they chose simply not to consider the evidence of danger to the public, concluding that the judicially-created *per se* doctrine made the evidence superfluous.

E. The Government Opposes Application Of The Rule Of Reason Because The Government Has Failed To Develop Evidence Of Unreasonableness.

After the complaint in this case was filed, a team of several Justice Department attorneys spent months searching the United States for evidence that the ethical canon against bidding in engineering is unreasonable. They posed far-ranging interrogatories and combed NSPE's files (taking copies of more than 10,000 documents therefrom), as well as the files of many other local, state and national engineering societies, and the files of numerous engineering firms. Additionally, the Government attorneys noticed 22 depositions of individuals, associations and firms, and privately interviewed engineers, consumers of engineering services, economists and others.[207]

After all of its probing for evidence of unreasonableness, however, the Government ultimately did not take a single deposition, mounted no case-in-chief at trial on the issue of reasonableness, and has never briefed that issue on the facts. The Government's entire case-in-chief consisted of documents, all of which, according to the Government's trial attorney, were offered for the proposition that *per se* was the controlling rule in the case,[208] and not to elucidate the rule's reasonableness or unreasonableness. The Government's trial strategy is revealed in the

[207] *See generally* J. App. 1-10.

[208] *See* J. App. 2040.

following quotation from its Post-Trial Memorandum, filed in the District Court on July 29, 1974:

> [A]ssuming *arguendo* the accuracy of NSPE's predictions concerning the social and other evils resulting from price competition [sic] in the field of engineering, they should not be considered by this Court. [*Id.* at 21.]

(The District Court's conclusion that it "need not consider" [209] the evidence on the issue of reasonableness echoed the language of that plea, just as the District Court's opinions echoed the Government's briefs, and just as the District Court's "findings of fact" were adopted verbatim from among those submitted to it by the parties).[210] The Government did establish at trial the proposition, not contested here, that professional engineering is in interstate commerce.

Similarly, the Government did not even attempt to establish that the ethical canon is unreasonable during proceedings in the District Court on remand following this Court's vacation of the first District Court judgment. Instead, the Government stated then that the District Court had "correctly refused" to consider whether the canon "serves an honorable or worthy end." Plaintiff's

[209] 389 F. Supp. at 1199, J. App. 9938.

[210] This Court and other appellate courts have strongly criticized, as an abdication of the judicial function, the verbatim adoption by trial courts of findings proposed by a party. *See United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *G.M. Leasing Corp.* v. *United States*, 514 F.2d 935, 940 (10th Cir. 1975), *modified on other grounds*, 429 U.S. 338 (1977); *Kelson* v. *United States*, 503 F.2d 1291, 1294-95 (10th Cir. 1974); *George W. Bennett Bryson & Co.* v. *Norton Lilly & Co.*, 502 F.2d 1045, 1049 n.17 (5th Cir. 1974); *FS Services, Inc.* v. *Custom Farm Services, Inc.*, 471 F.2d 671, 676 (7th Cir. 1972); *In re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747, 750-52 (3d Cir. 1965).

Memorandum On Remand, filed in the District Court on October 15, 1975, at 15.

It is plain that unless the *per se* rule is applied, the Government cannot prevail. The Government will ask this Court to affirm as *per se* unreasonable an ethical rule which the Government, notwithstanding great effort before, during and after trial, has failed to show is unreasonable on its facts.

Contrary to the Government's preconception in this case, bidding is consistent with the Sherman Act's purpose only in those situations where it fosters competition. Such situations are common, and perhaps characteristic of our economy, but as the Court has observed they are not universal. Where, as in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948), bidding provides the form but not the substance of competition, no antitrust rule requires its maintenance. There the Court stated in striking down, in light of facts peculiar to the movie business at that time, competitive bidding provisions of the district court decree:

> The system [of competitive bidding in the district court decree] uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. [*Id.* at 164.]
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> • • • •
>
> . . . [W]e do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets . . . . [*Id.* at 165.]

It is to the substance, and not the empty form, of competition that this Court has looked; it is the form, and not the substance, which the Government's approach to this case exalts.

II. THE POLICY PRESCRIBED BY UNITED STATES AND STATE STATUTES AND REGULATIONS CANNOT PROPERLY BE DECLARED *PER SE* UNREASONABLE.

A. United States Statutory And Regulatory Policy On Point Dates From 1925 And Is Identical To NSPE Policy.

To understand the Justice Department position here, it is important to review some legislative background. Before enacting the Brooks Act, Pub. L. No. 92-582, 86 Stat. 1278, 40 U.S.C. §§ 541-44 (Supp. II 1972)—which codified United States policy, in effect since 1925, prohibiting selection of engineers by bidding—Congress conducted a study of the subject. Hearings, analyses, submissions, reports and debates consuming thousands of pages figured, and the many prior laws on point were studied.[211]

The Justice Department Antitrust Division participated actively in the legislative process, opposing the bill. The Acting Deputy Assistant Attorney General, Bruce Wilson, testifying at April 1972 House of Representative hearings, stated that the Department's opposition was based on "antitrust and competition policy and philosophy." [212] He said,

> I think we are all concerned that the Government receive highly qualified architectural and engineering services at a cost which is fair, reasonable, and in line with that which the Government would pay if

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[211] *See, e.g.*, J. App. 2810-3682.

[212] Architect-Engineer Selection Bill: Hearings on H.R. 12807 and H.R. 157 Before a Subcomm. of the House Comm. on Government Operations, 92d Cong., 2d Sess. 64 (1972) (hereinafter "1972 House Government Operations Comm. Hearings"), J. App. 3163. *See also* Procurement of Architect and Engineer Services by the Federal Government: Hearings on H.R. 16443 before a Subcomm. of the House Comm. on Government Operations, 91st Cong., 2d Sess. (1970), J. App. 2810 *et seq.*

we had competitive bidding *as we hope to have in the private sector.*[213]

To those remarks, Congressman Brooks, Chairman of the House Government Operations Committee, responded as follows:

> I have not dealt with a great many engineers, but a couple of them and I have carefully tried to determine who will do the best job for me, keeping in the back of my mind how much will that distinguished character charge me. I really don't love architects and engineers. They are difficult to deal with. You and I know that, as lawyers. They are much more difficult than lawyers. And I chose people and selected them very carefully in my mind as to qualifications and experience and then talked to them about how much were they going to charge me. This has been my practice, and I think it is the practice of almost all the people that build buildings. So I would say we might want to rephrase that thought.
>
> We have bidding in many types of items on a straight competitive basis.
>
> But this is a little different operation and I think most private operations are based on a procedure very much like this legislation.[214]
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> • • • •
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> I think that the Government is pretty well served by a careful price evaluation after they determine which group they are going to utilize. I want you to remember that I feel that the Government and private individuals are all very much alike, and that we do want to get good services, as you do and I would as an individual, and as we would for the Government. But we also want them to be within the

[213] 1972 House Government Operations Comm. Hearings 66, J. App. 3165 (emphasis added).

[214] 1972 House Government Operations Comm. Hearings 67, J. App. 3166.

price frame, as you point out, of what is reasonable, what is fair.

We would take cognizance of what is done in the private sector. None of this is precluded from the pretty stiff competition which is envisioned within this legislation. The architects themselves, the engineers, will talk business with you. They are willing to get that pencil out and decide whether or not this project is such a large project. They don't even talk about 6 percent, if it is a big project. They start talking about 5½ percent at the first meeting and work down to 5 and get well below that in many instances. And they will do it for that. And they have never apparently been criticized by their colleagues for any violation of the code.[215]

• • • •

The code and ethics, we would be delighted to leave to you. I don't think the code and ethics are a great problem for this committee. But the procurement of good service is. And the real difficulty and tremendous expense and risk that the Government runs by just shopping for bids is what really concerns me.[216]

After extensive colloquy with the Justice Department representative, Congressman Brooks asked him this:

> To your knowledge, did the Attorney General go out and shop for an Acting Deputy Attorney in charge of the Antitrust Division . . . . before he selected you?
>
> • • • •
>
> Do you think they really just pick the man on the basis of his quality; do you feel that?
>
> MR. WILSON: I like to feel that way, Mr. Chairman.

[215] 1972 House Government Operations Comm. Hearings 67-68, J. App. 3166-67.

[216] 1972 House Government Operations Comm. Hearings 69, J. App. 3168.

MR. BROOKS: That is a good answer.[217]

In October 1972, Congress enacted the Brooks Act. In December 1972, the Justice Department, having failed to get its way in Congress, brought the instant lawsuit.[218]

NSPE does not now, nor has it ever, contended that either the Brooks Act or any of the other federal statutes and regulations which declare the same policy as NSPE's ethical provision comprise an exemption from the Sherman Act. In enacting these statutes and promulgating these regulations [219] the United States' object has not been amendment of the Sherman Act, but rather protection of the public from unreasonable and unwarranted risk and expense.[220]

It is anomalous that the Justice Department, after unsuccessfully attempting to persuade Congress that a prohibition on bidding in the engineering field was unreasonable, now argues that this Court should strike down such a prohibition without considering that issue.

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[217] *Id.*

[218] Even as late as the trial of this case, the Antitrust Division has continued to oppose the Brooks Act, 40 U.S.C. §§ 541-44 (Supp. II 1972), expressing to the District Court in its Post-Trial Memorandum (filed on July 29, 1974) at 41, the hope that the statute would be nullified. Neither the balance of the Executive Branch nor Congress has concurred with this sentiment.

[219] For illustrative statutes and legislative history, prior to the Brooks Act, on point, *see* Pub. L. No. 68-463, 43 Stat. 974 (1925); Pub. L. No. 69-141, 44 Stat. 305 (1926); Report of the Arlington Memorial Bridge Commission, S. Doc. No. 68-95, 35-36 (1925); H.R. Rep. No. 1312, 76th Cong., 1st Sess. 2-3 (1939), J. App. 3582; S. Rep. No. 263, 76th Cong., 1st Sess. 22-23 (1939), J. App. 3551; 10 U.S.C. § 4540 (1970), J. App. 3534; 10 U.S.C. § 7212 (1970), J. App. 3577; Pub. L. No. 91-511, 84 Stat. 1204 (1970), J. App. 3659; Pub. L. No. 92-145, 85 Stat. 394 (1971), J. App. 3638; Pub. L. No. 92-545, 86 Stat. 1135 (1972), J. App. 3617.

[220] *See, e.g.*, S. Rep. No. 92-1219, 92d Cong., 2d Sess. (1972), J. App. 3393; H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. (1972), J. App. 3346.

If a litigant sued the United States, or any agency of the United States, claiming that the Brooks Act's requirements worked an injustice upon him, the Justice Department would certainly declare the Brooks Act to be a duly enacted statute, reasonable on its face and in its application, from the lawful enforcement of which no complaint lies but to Congress. But now the Government dons another hat, and states that the policy is "pernicious" and prohibited as a matter of law. NSPE submits, *per contra*, that endorsement and advocacy of statutory policy are not "pernicious", but are reasonable.

B. The Policy Of Virtually Every State Which Has Acted On The Subject Is Identical To NSPE Policy.

The record in this case also contains voluminous state laws and regulations prohibiting bidding as a method of obtaining professional engineering work.[221] The record shows 32 states as expressly prohibiting the practice by law,[222] and 14 more which appear to do so.[223] The record also shows that 16 of the 21 states which have promulgated statutes of general application requiring bidding in state procurement provide that engineering is outside the scope of the requirement.[224] At least 49 state court

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[221] J. App. 3683-5477.

[222] Alabama, Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kentucky, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin and Wyoming. With respect to this and the two following footnotes, *see* J. App. 3683-5477; Cert. App. A-25 - A-50, *passim*.

[223] Arkansas, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Mexico, Rhode Island, Utah and Vermont.

[224] Alabama, Alaska, California, District of Columbia, Florida, Idaho, Illinois, Kentucky, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas and Wyoming. *See Recon-*

[continued]

decisions [225] reject bidding as a method of obtaining professional services, and no state court decision of which we are aware holds the contrary.

C. A Standard Promulgated By Congress, United States Departments and Agencies, State Legislatures, Regulatory Bodies And Courts Is Not Unreasonable As A Matter Of Law.

The proposition that statutes and prior court decisions are the standard of reasonableness as to their subject matter is hornbook law, applied in hundreds if not thousands of cases. *See* O. Holmes, *The Common Law* 89-90 (Howe ed. 1967); *Martin* v. *Herzog*, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920) (Cardozo, J.); W. Prosser, *Law of Torts* 188-204 (4th ed. 1971); *Head* v. *New Mexico Board*, 374 U.S. 424 (1963); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Olsen* v. *Smith*, 195 U.S. 332 (1904).

The Court's statement in *United States* v. *Morgan*, 118 F. Supp. 621, 697 (S.D.N.Y. 1953) is on point. There, in rejecting the contention that actions taken by investment bankers in accordance with policies expressed in the Federal securities laws were nonetheless illegal under the Sherman Act, the Court said:

> It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of antitrust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and

[footnote 224 continued]
struction Finance Corp. v. *Beaver County*, 328 U.S. 204, 210 (1946). ("We think the Congressional purpose can best be accomplished by application of settled state rules . . . so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act.")

[225] *See* Cert. App. A-60 - A-62.

> comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and penetrating investigations. *They intended no exemption to the Sherman Act;* and it is hardly probable that they would inadvertently accomplish such a result . . . *This recognition by the Congress of the legality and utility to the American economy of the general features of the* [*practice attacked*] *cannot lightly be disregarded by any court or judge.* [Emphasis added.]

Where, as here, the statutory declaration involved is the same as the practice attacked, it would be unseemly to declare the practice *per se* illegal.

In previous briefs in this case, the Government cited *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), for the proposition that consistency of private conduct and United States statutory policy has no bearing on Sherman Act liability unless the private conduct is specifically compelled by United States statute.[226] *Socony-Vacuum* does not in fact so hold, and is inapposite here. As the Government briefs have always failed to mention, the statute involved in *Socony-Vacuum*, the National Industrial Recovery Act (NIRA), contained a provision (§ 2(c)) authorizing the granting of Sherman Act immunity, on a case-by-case basis, to applicants who fixed price levels in connection with NIRA buying programs. 310 U.S. at 226. As this Court noted, no such immunity was ever sought by the respondents involved in *Socony-Vacuum*. *Id.* Moreover, although NIRA expired in June 1935 (having been declared unconstitutional on May 27 of that year in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495) respondents' price-fixing "continued unabated during the balance of 1935 and far into 1936." *Id.* at 227. Thus, the alleged "Congressional sanction"

[226] *See, e.g.*, the Government's Motion to Affirm filed herein in February 1975 (*National Society of Professional Engineers* v. *United States*, No. 74-872) at 9.

invoked in *Socony-Vacuum* was in fact no sanction at all, and was irrelevant to the outcome of the case. Further, the statute involved in *Socony-Vacuum* and the statutes identified in the instant case are not analogous. NIRA, far from identifying the restraint alleged in *Socony-Vacuum* to be reasonable, did not even advert to it. Instead, NIRA merely delegated to the President a generalized authority to regulate the economy—which delegation the Court in *Schechter Poultry, supra*, held so overbroad and unspecific as to be unconstitutional. Conversely, the Brooks Act, and other statutes cited here, precisely described United States policy on the subject of the instant case, and directly repudiate bidding in engineering. NSPE's ethical principle, in short, conforms exactly to the statutory arrangement prescribed in the Brooks Act and other United States statutes in effect for more than a half century; conversely, respondents in *Socony-Vacuum* were engaged in a price-fixing scheme which lacked any statutory analogue and which, for most of the time it was perpetrated, was not under even colorable "authority" of the unconstitutional statute involved in that case. Examination of the facts thus reveals that the Government's reliance on *United States* v. *Socony-Vacuum Oil Co.* is misplaced.

We emphasize that even 52 years of Congressional and Executive Branch approval and enforcement of the practice attacked in this case do not bar subject matter jurisdiction under the Sherman Act, in the absence of an express statutory exemption therefrom. No such exemption, express or implied, is claimed. We emphasize equally that Congressional and Executive Branch study, approval and enforcement, over a 52 year period, of the practice at issue are relevant, and powerfully tend to establish that the practice is reasonable. Congress first acted on the subject of this case long before NSPE came into ex-

istence.[227] The *per se* ruling below precluded all consideration of the foregoing facts, and thus neither of the lower courts made any analysis of the rationale underlying the relevant statutes and regulations, or of the laws themselves.

III. THE ETHICAL PRINCIPLE AT ISSUE IS NOT UNREASONABLE.

A. The Burden Of Establishing Unreasonableness Is On The Government.

Logic and precedents demonstrate that in a Sherman Act Section 1 case the plaintiff has the burden of establishing that the alleged restraint is (1) *per se* illegal or (2) unreasonable. As the Eighth Circuit recently stated in *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 308 (1976), *cert. denied*, 429 U.S. 1122 (1977):

> Counsel for the United States apparently believes that the burden is on Empire to establish the reasonableness of each of the more than 3,000 contracts with their varying terms. However, the burden of showing unreasonableness of a restraint of trade, except where there is a *per se* violation of the Act, is on the plaintiff.

See also United States v. *Citizens and Southern National Bank*, 422 U.S. 86, 97 (1975) (upholding district court determination that "the Government had not sustained its burden of proof as to the unreasonableness of the practices involved"); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967) ("The burden of proof in antitrust cases remains with the plaintiff") (holding on this point not affected by *Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra*); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 228 (1947) (requiring Government "proof of an undue restraint of interstate

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[227] Pub. L. No. 68-463, 43 Stat. 974 (1925); Pub. L. No. 69-141, 44 Stat. 305 (1926).

trade"); *cf. Times-Picayune* v. *United States*, 345 U.S. 594, 622 (1953).

Unless the plaintiff had the burden of proving unreasonableness in civil antitrust cases, every time such cases were brought by the Government a presumption of liability would attach, since *per se* cases would continue to impute an irrebutable presumption of liability, and rule of reason cases would impute a rebuttable presumption of liability. No court has ever stated that the Government is entitled to a presumption of liability in an antitrust case.

B. There Is No Evidence Of Unreasonableness In The Record.

The Court will find no evidence of unreasonableness in the record. NSPE called 17 witnesses. The Government called 3 witnesses, all in "rebuttal." The Government called one engineer, a Government employee. This individual was a teacher at a military academy whose practical experience was as an employee of military contractors and a jewelry manufacturer.[228] He testified that there is no difference between a customer of a manufacturer and a client of an engineer.[229] He had no experience in engineering design work that affects public safety, but was familiar with rocket ships[230] and like articles outside the scope of the ethical rule.[231]

The Government called an economist, an Antitrust Division employee. He admitted under oath that his testimony was coached in the courtroom by his superior in

[228] J. App. 2150-52, 2188.

[229] J. App. 2198.

[230] J. App. 2190-91.

[231] J. App. 2180.

the Justice Department.[232] He also neither had experience in nor had he made a study of engineering; he relied on figures published in a magazine which he made no attempt to verify; he used a preposterous sampling technique; and he could not define rudimentary statistical terms.[233]

The Government's only other witness was a manufacturer who was a member of a procurement commission. His commission's own report, which he endorsed, expressly rejected bidding as a method of obtaining engineering services,[234] and he testified that no member of the commission favored bidding as a method of selecting engineers.[235]

C. In Addition To The Laws on Point, There Is Massive Evidence That The Ethical Principle Is Reasonable.

The massive record evidence relating to the issue of reasonableness in this case is summarized in the Statement of the Case, and not repeated here. The sources of this evidence are among the most distinguished individuals in engineering, and leading scholars, teachers, and consumers of engineering services—including, for example, the Architect of the Capitol, the Admiral responsible for Navy procurement of engineering services, and the Assistant Commissioner of the General Services Administration who hired the outside engineers used by the Government on its civilian projects. Each of these individuals testified that bidding in engineering is against the public interest. What the occupational sociologists said in this case, on the basis of their observations, turned out to be essentially the same as what the leading liability

[232] J. App. 2274-75.

[233] J. App. 2224-25, 2275-2308, 2311-16.

[234] J. App. 2110-11, 6713.

[235] J. App. 2108.

insurer testified on the basis of actuarial data: Bidding in engineering is ill-advised, dangerous and irreconcilable with professional engineering.

D. The Ethical Principle Applies Only Where Public Safety Is Directly At Risk.

Contrary to the Government's repeated statements, the ethical principle does not "comprehensively" [236] relate to all engineering work, but, as undisputed documentary evidence establishes, relates only to work which immediately affects public safety. Studies,[237] research and development projects,[238] construction of prototypes,[239] subprofessional work,[240] and work not relating to structures to be used by the public [241] are all outside the principle's scope. The foregoing facts—although neither of the lower courts adverted to them—are undisputed.

E. Even If NSPE's Ethical Canon Were Overbroad, The Proper Remedy Would Be Restatement Under The Rule Of Reason, Not Extinction Of The Principle Under The *Per Se* Rule.

If, notwithstanding the foregoing limitations on the scope of the principle against bidding, the principle were misapplied to a situation not involving public safety, or if the principle were in any other respect too broadly implemented, the obvious remedy would be to prohibit the misapplication or overbreadth, not to abolish the underlying principle. Even the Circuit Court in this case, while

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[236] Brief for the United States in Opposition at 5-6.

[237] J. App. 1788-89, 2805-06.

[238] J. App. 1788-90, 2599-2600, 2667.

[239] J. App. 2599-2600.

[240] J. App. 1788.

[241] Cert. App. A-56, J. App. 5479; J. App. 1788-89, 2445, 2599-2600, 2667, 2805-06.

affirming the District Court's *per se* holding, recognized as "legitimate" the objective of preventing deceptive bids.[242]

The preservation by courts of legitimate ethical principles, while limiting their application to situations which require them, is entirely feasible, as the Court's decision in *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), demonstrates. While the facts in *Bates* are markedly different from those here, and while *Bates* was grounded on the First Amendment and not antitrust,[243] the Court's approach there is instructive.

In *Bates* the Court reviewed the history, purposes and effects of prohibitions on advertising by lawyers, and concluded:

> In sum, we are not persuaded that any of the proffered justifications rises to the level of an acceptable reason for the suppression of *all* advertising by attorneys. [97 S.Ct. at 2707. Emphasis added.]

The Court then stated that because the Bar's rule against advertising was unconstitutionally overbroad, under established First Amendment overbreadth doctrine it could be entirely struck down even if appellant's advertisement might have been constitutionally prohibited by a narrower rule. The Court said that, in the usual case involving a restraint on speech, a showing that the restraint was overbroad would suffice to invalidate it, and appellants would prevail regardless of the nature of their acts. *Id.*

However, the Court went on to say, since the overbreadth doctrine is "strong medicine", to be employed

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[242] 555 F.2d at 983, Cert. App. A-10.

[243] The Court held that the doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), immunized the State Bar from application of the Sherman Act. 97 S.Ct. at 2698.

sparingly and only as a last resort, "we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective." 97 S.Ct. at 2708. The Court then analyzed the Bar rule's application to the routine and fungible legal services mentioned in appellants' advertisement.[244] Finding the prohibition unjustified in relation to such services, the Court struck down the rule only insofar as it applied to them. The Court carefully noted:

> In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. [*Id.*]

Thus, under the First Amendment, the Court expressly rejected a *per se* approach and adopted a rule of reason approach which permitted restatement of the rule against advertising within limits indicated by the Court. Such an approach is equally appropriate under the Sherman Act. *See Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 324 U.S. 570 (1945). The Sherman Act is no more compelling than the First Amendment, and no more requires inflexible application. *See Associated Press* v. *United States*, 326 U.S. 1, 20 n.18 (1945). Detailed consideration of arguments and evidence, carefully limited holdings, and recognition of the possibility of reasonable regulation in the field are surely as appropriate in applying the Sherman Act to professional principles as in applying the First Amendment to them.

The Circuit Court decision under review is internally inconsistent on this point. The Circuit Court recognized that the ethical principle at issue has "the legitimate objective of preventing deceptively low bids. . . ." 555 F.2d at 983, Cert. App. A-10. However, the Circuit Court also

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[244] In engineering, there is no counterpart to such services. *See* J. App. 247-51, 772-73, 1156-57, 1222, 1452, 1610, 1990.

said that, to promulgate a rule to achieve the legitimate objective, NSPE must move the District Court for modification of the decree. *Id.* But if the Government's contention is correct there is no room for consideration of the legitimacy of objectives here. The Circuit Court view that (1) NSPE is not entitled to a hearing on the legitimacy of its objectives and the proper scope of its rules before entry of a decree, but that (2) NSPE can secure such a hearing on a motion for modification after entry, is illogical and unfair.

NSPE has contended since the beginning of the case that it is defending the principle embodied in Section 11(c), not the precise formulation. As with legal principles, such as the First Amendment, the Sherman Act, the commerce clause, and innumerable others, so with professional principles such as the one reflected in Section 11(c), the bare language of the provision does not fully determine the scope; ascertainment requires reference to authoritative interpretations. In the case at bar these show that the rule is not, as stated by the Circuit Court, a "broad ban on all competitive bidding", 555 F.2d at 982, Cert. App. A-9, but is limited to those particular situations, specified by BER opinions and NSPE statements, in which there is reason to believe that bidding endangers the public.

Of course it would simplify matters if the limitations on Section 11(c)'s scope were stated in plain language in the Section. But engineers can hardly be faulted for having failed to attain in their statement of professional principles a specificity that the lawyers have been unable to achieve in the statement of analogous principles of law. A blue-ribbon Task Force on Ethical Matters has been formed within NSPE for the purpose of reformulating and updating its Code of Ethics. Certainly it will eliminate any anachronistic reference to "recommended fee schedules prepared by various [other] engineering

societies." However, it cannot proceed much further until the governing legal principles under which it must operate have been determined. When that has occurred the NSPE Task Force will proceed promptly. In any event, if this case is dismissed, and the revised statement of ethical principles is not reasonable, the Government is free to institute another antitrust action. No threat to any interest protected by the Sherman Act, or to the public, will arise from dismissal of this case.

Public interest would be jeopardized by a holding that the *per se* rule applies to the ethical principle. If the *per se* rule applies, the engineering profession is presented with the dilemma of either disregarding the public interest in one of the crucial aspects of professional practice, or trying to formulate a new statement of the principle which will somehow avoid application of the *per se* rule by some means not yet suggested by the lower courts or the Government. On the other hand, if the rule of reason applies, there is both a legal path and guidance to appropriate revision of Section 11(c), as well as other sections of the Code. Until the issue in this case is decided, NSPE's Task Force on Ethical Matters cannot proceed with confidence.

As the record discloses, procurement of engineering services will continue to be a necessity for thousands of clients regardless of any decision this Court, or any court, may render. Legal precedent, analogy and common sense argue that even if the Court regarded the principle's present formulation as overbroad, the proper remedy would be not to extinguish the principle under the *per se* rule but to permit its formulation under the rule of reason.

IV. THE JUDGMENT IN THIS CASE, BY ENJOINING EXPRESSION OF FACTS AND BELIEFS, AND ASSOCIATION TO ADVANCE THOSE BELIEFS, ABRIDGES NSPE'S FIRST AMENDMENT RIGHTS.

A. The Judgment Is A Blunderbuss Drafted By Government Lawyers Prosecuting The Case, Not By A Court, And Entered Without A Hearing On Its Terms.

The District Court entered the same judgment twice. The circumstances of its entry are stated above.[245] In short, Government attorneys simply presented the District Court with a proposed judgment drafted by them. The District Court entered it without change, without a hearing, and with no more than a few minutes of informal discussion. At the argument on remand, NSPE requested an opportunity to be heard on the form of the order if one was to be entered. The request was not granted, and the judgment was entered, without further proceedings, in the same terms as the judgment previously vacated by this Court. Thus, there has never been a hearing on the judgment's form, and the District Court has not considered any judgment other than the one prepared by the Government prosecuting attorneys.

The judgment is an exhaustive order of eight legal-size pages which, in sweeping terms, prohibits NSPE and all associated with it from stating facts, expressing views or advocating a policy NSPE considers essential to public safety and welfare.[246] Because the judgment is prolix and redundant, analysis is required to lay bare its extraordinary sweep. The judgment applies to NSPE, its officers, and all of its members, since the term "de-

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[245] *See* point 9 of the Statement, *supra*.

[246] The judgment appears at Cert. App. A-15 *et seq*.

fendant" includes all of them.[247] The order's scope can best be indicated by stating the prohibitory terms in the words of the order itself, omitting excess verbiage.

Section IV states: Defendant is enjoined from participating in any course of action which in any manner discourages members from submitting price quotations for engineering services at such times as they may choose.[248]

Section V states: Defendant is ordered to amend its policy statements, Board of Ethical Review opinions, manuals, and any other of its statements or publications, to eliminate any references which in any manner discourage submission of price quotations for engineering services, or which state or imply that submission of price quotations for engineering services is against the public interest.[249]

Section VII states: Defendant is enjoined from disseminating in any of its publications or otherwise any opinion, policy statement, resolution or guideline which in any manner discourages submission of price quotations for engineering services, or which states or implies that submission of price quotations for engineering services is against the public interest. Defendant is ordered to state in any publication of its Code of Ethics that submission of price quotations for engineering services at any time is not unethical.[250]

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[247] By Section III the judgment applies to all persons in concert or participation with NSPE who receive notice of the judgment. Since Section VIII requires publication of the judgment in NSPE's magazine and newsletter, and also requires delivery of a copy to each new member of NSPE, it appears that the judgment applies not only to NSPE but also to all of its members.

[248] Cert. App. A-16.

[249] Cert. App. A-16.

[250] Cert. App. A-17.

Section IX states: Defendant is ordered to refuse NSPE affiliation to: (A) any state engineering society which in any manner discourages its members from submitting price quotations for engineering services at such times as they may choose; and (B) any state engineering society which has any local chapter which in any manner discourages its members from submitting price quotations for engineering services at such times as they may choose.[251]

It is evident from the summary of the record in this brief that the facts known to NSPE, and the opinions of its officers and members, would certainly tend to discourage engineers from submitting "price quotations for engineering services" before they have studied the problem involved, made an analysis, and performed the other functions which should precede any professional opinion. It is also evident that NSPE and its officers and members regard solicitation of engineering work by bidding as against the public interest. Yet the judgment would prohibit any statement of facts known to NSPE and its members on this subject, and any expression of the views of those who believe the public interest is affected by this matter. The judgment would prohibit advocacy of any policy or position with respect to any of the dangers or difficulties of soliciting engineering work by bidding. The judgment would prohibit any statement relating to the time or manner in which "price quotations for engineering services" should be submitted. Further, the judgment would require NSPE, under threat of contempt penalties, to police every state and local engineering society having any manner of affiliation with NSPE.

The sweeping blunderbuss character of this judgment can be illustrated by considering its potential application to a few facts in this record. Literally applied, the

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[251] Cert. App. A-18 - A-19.

judgment would prohibit stating United States policy with respect to procurement of engineering services; or advocating that engineers should comply with United States policy, or with the similar policies of the States. Literally applied, the judgment would prevent NSPE and its members from opposing repeal of the United States statutes on the subject of engineering services procurement, and from advocating passage of State laws embodying the same policy.

Under the judgment NSPE could not publish the testimony of Mr. Duvall on the subject of bidding, or an article summarizing the facts testified to by Mr. Duvall stating the number of engineering malfeasance cases and accidents related to bidding.[252] The judgment appears even to prohibit NSPE from advising its members of the unavailability of liability insurance to engineers who bid. Under Section IV of the judgment, NSPE would risk contempt if it even made the record in this case—not to mention any of its briefs herein—available to its members, since any review of the record or briefs would surely discourage engineers from submitting "price quotations" before they had an opportunity to analyze the problem involved.

The judgment is so repressive and broad that under it if a Justice of this Court writes an opinion in this case summarizing NSPE's position and commenting favorably on it, NSPE could not publish that opinion in its magazine or newspaper and could not state its agreement with a Justice of this Court. If this does not infringe First Amendment rights, it is difficult to conceive what does.

B. The Judgment Is An Unconstitutional Prior Restraint On Speech And The Press.

There is a very strong presumption against the constitutional validity of any prior restraint on speech or pub-

[252] *See* point 8(A) of the Statement, *supra*; and J. App. 976-1068 for the testimony of J. Sprigg Duvall.

lication. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Organization For A Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). In *New York Times Co.* v. *United States*, the Court, in the face of claims that the very security of this nation was imperiled by the publication sought to be enjoined, held that such an injunction is contrary to the First Amendment's guarantee of freedom of expression. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976).

Even where a prior restraint has been imposed in support of valid governmental interests or important governmental objectives, the First Amendment prohibits it. In *Carroll* v. *Princess Anne*, 393 U.S. 175 (1968), this Court set aside a restraining order against the holding of a public rally by a white supremacist group, saying:

> An order issued in the area of First Amendment rights must be couched in the narrowest means that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). [393 U.S. at 183-84.]

The constitutional requirement that the Government employ the most limited means available "to achieve an important governmental objective" when acting in the area of First Amendment freedom applies even where speech is purely commercial. *Linmark Associates* v. *Township of Willingboro*, 97 S.Ct. 1614 (1977).

Even if, *arguendo*, the ethical principle advocated by NSPE were held illegal, and the *per se* rule applied, that would not warrant enjoining NSPE from publishing in

its monthly magazine (*Professional Engineer*) or its newspaper (*NSPE News*), or from otherwise advocating the view that the Justice Department is mistaken and that the principle serves the public interest. Even in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), where the Court held a statutory prohibition of commercial advertising of drug prices unconstitutional, the Court made clear that advocacy of such prohibition was fully protected by the First Amendment, saying:

> No one would contend that our pharmacist may be prevented from being heard on the subject whether, in general, pharmaceutical prices should be regulated or their advertisement forbidden. [425 U.S. at 761-62.]

Yet in the present case the Government is contending, and the lower courts have held, that our engineers may be prevented from being heard on the subject whether, in general, bidding should be used in engineering solicitation or procurement.

Enforcement of the Sherman Act does not justify disregarding or limiting First Amendment principles. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). In *Noerr* the Court held that the Sherman Act cannot be applied to prohibit an organization from advocating a public position, saying:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. [365 U.S. at 139.]

This Court also held that it was immaterial that the position taken may have had an anti-competitive purpose or effect.

The judgment in the present case runs directly contrary to the *Noerr-Pennington* doctrine. Even casual inspection of the record will show that the Government relied on exhibits which are NSPE documents, addressed to public officials, advocating procurement of engineering services on the basis of competence, as provided in Federal statutes, rather than bidding, and advancing arguments that this is in the public interest.[253] Obviously, the

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[253] *See, e.g.*, J. App. 6791-93; J. App. 9897; J. App. 9907.

The Circuit Court opinion refers to a 1970 proposed Defense Department (DOD) test of a new procedure for selection of A/E firms. The opinion asserts that NSPE advised its members that the proposed one-year procedure was unethical, and urged them not to submit price information. "As a result", according to the opinion, DOD was unable to obtain price proposals under the test procedure. 555 F.2d at 983, Cert. App. A-10. That description is erroneous and extremely misleading. In fact, the proposed test was contrary to existing Government regulations; failed to provide for the furnishing of information on which price proposals could be based; was inadequate in numerous respects; was nebulous due to DOD's failure to provide detailed information about the matter; and was prohibited by Congressional Act before it was implemented. All evidence relating to the matter comes from Government exhibits, from which the following facts appear.

On July 17, 1970, COFPAES (Committee on Federal Procurement of A-E Services), of which NSPE was a member, sent a letter to Barry J. Shillito, Assistant Secretary of Defense, thanking him for a meeting to discuss the proposed test procedure, and requesting further information. COFPAES requested a copy of the report on which the test proposal was based, and an implementation timetable. J. App. 6022-23. On August 14, 1970, Mr. Shillito replied, refusing to release the report, and stating that the time contemplated was a period of one year commencing August 1970. J. App. 6024-25.

On August 19, 1970, COFPAES replied, stating that any test should be conducted under controlled conditions and its results objectively evaluated, and that the proposal failed to meet these

[continued]

[footnote 253 continued]
criteria. The letter pointed out that the proposal directly contradicted Congress' expressed intent. J. App. 6026-27.

On August 25, 1970, the Consulting Engineers Council (CEC) informed its members of DOD's refusal to either release the report on the proposed test or provide other information; and advised that "we are leaving it to each firm to decide" whether a response would be proper. J. App. 6030-31.

On the same day, COFPAES issued a Press Release stating its reasons for objecting to the DOD test. These included the fact that the test could not be valid because it did not include any method permitting objective evaluation of the results, and provided no controlled conditions. Further, the test disregarded Congress' intent. J. App. 6048-49.

On September 11, 1970, CEC sent a memorandum to its members reviewing the matter and stating the main objections to the proposed test. These were: (1) The requirement of a technical proposal prior to a firm's analysis of a project "opens the door for incomplete solutions based upon insufficient and, possibly incorrect, information." (2) A savings of 1% in design costs could add 10% or more to the cost of construction, operation, maintenance, or all three. (3) No basic criteria for objectively evaluating the test have been established, and there are no controls. Since the test is planned for only one year it is doubtful that any of the facilities involved could be completed, thereby precluding meaningful results. (4) The proposed test ignores the expressed intent of Congress. J. App. 6040-43.

On September 11, 1970, NSPE sent a memorandum to its private practice members transmitting copies of the DOD announcement and of the COFPAES press release. It stated that there are many reasons for the long standing position of the engineering societies opposing bidding. "One of the important reasons is that usually it is not possible for a firm to submit a price with its initial proposal of qualifications in the absence of a full understanding of the scope of the project, time for its completion, assignment of designated personnel and changes in the scope relative to budget limitations. The submission of a price without the benefit of full-scale negotiations is contrary to the public interest and can be disastrous to the client and the consulting engineer." The memorandum did not instruct members on the position to take if requested to submit proposals. J. App. 6044-45.

On October 19, 1970, the Assistant Secretary of Defense withdrew the proposal because of a provision in the 1971 Military Construction Authorization Bill passed by Congress providing that

[continued]

interests to which the NSPE advocacy are directed as much deserve First Amendment protection as the interests protected in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), *Noerr*, *Pennington*, and other cases cited above.

Further, as shown above, NSPE does not control its members' or affiliated organizations' actions, seeks no such control, has never attempted to exercise such control, and has never disciplined anyone in any manner for violating Section 11(c). NSPE has never denied that it has engaged in widespread, active and vigorous advocacy of its views on this matter. The record shows that this is all it has done. Accordingly, under the rule of *Noerr* and *Pennington*, its activity cannot violate the Sherman Act regardless of whether the Government judges the views advocated to be reasonable or unreasonable.

The Circuit Court did, properly, recognize that the scope of the judgment in this case impinges on protected First Amendment interests. It stated, correctly, that in this area "regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest." [254] Accordingly, it ordered that the decree provision compelling NSPE to state that in its

[footnote 253 continued]
A/E services "unless specifically authorized by the Congress . . . should continue to be awarded in accordance with presently established procedures, customs, and practices." J. App. 6072-73. Thus, the DOD proposed test procedure was withdrawn pursuant to Congressional directive before it was ever implemented. J. App. 6776.

In short, Government exhibits, which comprise all the evidence on the DOD incident, show that (a) the Circuit Court misapprehended the facts; (b) the disclosures DOD made to the engineers contained no suggestion that any of the dangerous consequences of bidding could be avoided; and (c) the engineering organizations, including NSPE, took no action except to inform their members of what was happening and attempt to persuade Government officials, including Congress, of the proper policy to follow. Clearly this was privileged conduct under the *Noerr-Pennington* doctrine.

[254] 555 F.2d 984, Cert. App. A-12.

view certain practices were not unethical should be excised from the judgment.[255] A month later this Court elucidated the principle implicit in the Circuit Court decision by holding in *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak and the right to refrain from speaking at all." *See also Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-58 (1974).

However, the Circuit Court erroneously understated the scope of First Amendment protections applicable here, as the cases upon which it relied establish. The three First Amendment cases on which the Circuit Court relied are *Edward G. Budd Mfg. Co.* v. *NLRB*, 142 F.2d 922 (3d Cir. 1944); *NLRB* v. *Teamsters and Chauffeurs Union*, 241 F.2d 428 (7th Cir. 1957); and *International Union of Electrical, Radio and Machine Workers* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F.2d 230 (1967), *cert. denied*, 390 U.S. 904 (1968). The cases sustain the view that a judgment enjoining speech, as involved here, is invalid—not the Circuit Court's more limited view that a judgment is only invalid to the extent it compels speech.

Edward G. Budd Mfg. Co. v. *NLRB*, *supra*, arose on an NLRB petition to hold a company in contempt of a court order requiring it to cease and desist from unfair labor practices. The petition was based on a company letter to employees which stated facts from the company's viewpoint, and advised that employees were not required to join any union and were free to form one of their own. The Third Circuit held that the letter did not violate the order, that neither the NLRB nor a court has the right under the Labor Act to interfere with an employ-

[255] This provision in the Court of Appeals decision is not in issue as the Government has stated that it does not contest this holding. Brief for the United States in Opposition at 12 n.14.

er's untrammeled expression of views, that the employer's free speech rights are not forfeited because of past misconduct, that the First Amendment applies to letters from employer to employees, and that the First Amendment privilege is not lost where there is no threat or act of discrimination, coercion or intimidation. The court observed that the Labor Act does not purport to authorize restraints on freedom of speech in any circumstances. 142 F.2d at 926.

NLRB v. *Teamsters and Chauffeurs Union*, *supra*, arose on an NLRB petition to hold a union in contempt of a Board order, embodied in a court decree, which required the union to desist from certain practices. The Board order and decree required the union to send a notice to its members. However, that was not at issue. With the required notice, the union sent a letter stating its view of the controversy, and claiming that its interests had in fact been upheld. The sending of the additional letter was the basis of the petition to hold in contempt. The Seventh Circuit held that this did not constitute contempt, as a limitation of free speech can be tolerated only where the speech is calculated to produce an illegal result, while letters containing no threat of reprisal or force, or promise of benefit, did not violate the decree and were constitutionally protected.

International Union of Electrical, Radio and Machine Workers v. *NLRB*, *supra*—the only other First Amendment case cited by the Circuit Court—involved a proceeding to enforce an NLRB order which required an employer who had violated the Labor Act to notify all employees of their statutory rights to be free from coercion, interference and restraint. The order also required the employer to have the notice read to the employees during working hours. The District of Columbia Circuit held that the part of the order which required the notice read to employees was beyond the NLRB's authority.

Nothing in any of the cases the Circuit Court cited supports the position that even violation of a statute warrants restricting the future exercise of First Amendment rights. On the contrary, these cases hold that (1) the Labor Act authorizes no restriction on either employer or union First Amendment rights, and (2) speech which does not threaten force, coercion, intimidation or the like is privileged under the First Amendment and cannot be restrained to serve the purpose of some supposed general statutory policy. Neither statute nor precedent suggests that the Sherman Act intrudes upon First Amendment rights any more than the Labor Act does—which is not at all.

C. The Judgment Unconstitutionally Prohibits Free Association.

As this Court has held, the right to associate with others of similar views is correlative to and co-extensive with the other First Amendment rights. Perhaps the most basic freedom protected by the First Amendment is freedom of thought. *See Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). Association is a principal social manifestation of thought.

> The purpose of a system of freedom of expression—to allow individuals to realize their potentialities and to facilitate social change through reason and agreement rather than force and violence—cannot be effectively achieved in modern society unless free rein is given to association designed to enhance the scope and influence of communication. [T. Emerson, *The System of Freedom of Expression* 432 (1970).]

In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court stated,

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. . . .

> Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. . . . [357 U.S. at 460.]

Similarly, in *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964), the Court held that a group boycott, even if it violates a valid law, may not constitutionally be the basis for an injunction against the right to associate to advocate ideas.

It is beyond question that the Sherman Act was not intended to abridge the right of association in any manner. Senator Sherman, in advocating its passage, said that the Sherman Act

> does not interfere in the slightest degree with voluntary associations made to affect public opinion. [21 *Cong. Rec.* 2557 (1890).]

Despite these clear legal principles, the judgment not only purports to impose broad prior restraints on speech and publication rights of NSPE and anyone who is or becomes a member, but goes beyond this to impose similarly far-reaching restraints on the rights of engineers to associate to advance their belief that the public interest requires that engineers be selected on the basis of competence. Moreover, the judgment restrains every state and local organization in any way affiliated with NSPE, thus prohibiting association among professional societies and their members. No such order was requested in the complaint; nor was its possibility raised in any pre-trial or trial proceeding, or ever mentioned until the moment when the judgment prepared by the Government was presented to the District Court and signed. No state or local society is party to the litigation, and no notice was given NSPE that a judgment in this case might undertake to impose obligations on such other organizations, or impose a duty on NSPE to influence, control or

police other organizations. Consequently, the propriety, necessity and difficulty of reaching state and local organizations by the means attempted in this judgment were not considered by the District Court. No consideration was given to seeking less restrictive means of achieving whatever objective the Government is entitled to achieve, or to reconciling the demands of the Sherman Act, however construed, and the First Amendment. For that reason alone, the judgment should be set aside.

In effect the judgment says that no person and no state or local organization can ever be affiliated with NSPE, no matter what the object of affiliation is or how lofty and impeccable the goals, unless that person, or that state or local organization, accepts the Antitrust Division's view —that procurement of engineering services by bidding rather than competence is proper regardless of professional experience, evidence of injury to clients, and danger to the public. It is difficult to imagine a more basic assault upon associational rights. Not a scintilla of evidence suggests the propriety or necessity of such a broad restraint.

Whatever else may be disputed, one fact that cannot be denied is that the Department of Justice disagrees with NSPE and its members as to the public policy considerations involved in obtaining professional engineering services. Government lawyers from the Antitrust Division confronted engineers, including NSPE officers and members, in a debate of these issues before Congressional committees long before the complaint in this case was filed. In these circumstances it is frivolous for the Government to contend that the issues involved are not political and ideological.

Whatever Sherman Act theory is ultimately applied in this case, whatever antitrust result ultimately reached, the First Amendment rights of NSPE, and of all others

governed by the judgment, are of overriding urgency. On its face, the judgment is an unconstitutional blunderbuss. It was never thoughtfully considered. It broadly prohibits statement of facts, expression of views, publication of ideas and advocacy of principles which NSPE and its members believe required by the public interest. The judgment also forbids association among and between NSPE, its members, other organizations, and the members of other organizations for any purpose unless all those associating within and with NSPE subject themselves to the restraints imposed upon NSPE, and accept views they believe to be false and contrary to the public good.

If the Sherman Act requires this, it is no charter of economic freedom, but rather a charter of ideological repression.

V. CONTRARY TO THE GOVERNMENT'S POSITION AND TO THE LOWER COURTS, THIS COURT'S PRIOR JUDGMENT IN THIS CASE WAS NOT A MEANINGLESS FORMALITY.

Sometimes, as here, advocates may disagree as to the meaning of this Court's mandate in a particular case. Where there is disagreement, interpretations may be made and inferences may be drawn, and the disputants may say the Court meant this, or the Court meant that.

However, it is not proper to conclude in such an event that, in vacating an antitrust judgment and remanding for reconsideration in light of an intervening precedent, this Court meant *nothing*. That, essentially, is the Government's and the lower courts' view of this Court's prior mandate in this case. The Government's view is especially puzzling when considered in the context of its argument that *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the intervening case, was decided under the *per*

se doctrine. If that were true, why did not this Court, in the light of *Goldfarb*, summarily affirm, rather than vacate, the District Court's *per se* judgment here?

Contrary to the Government's and the lower courts' view, NSPE believes that this Court's vacation of the District Court judgment, remanding for reconsideration in light of *Goldfarb* v. *Virginia State Bar*, was not a meaningless formality.[256]

The Court has stated that vacation of a judgment with instructions to reconsider in light of an intervening precedent is tantamount to reversal. In *Henry* v. *City of Rock Hill*, 375 U.S. 6 (1963), the Court vacated a South Carolina Supreme Court judgment and remanded for reconsideration in light of *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). On remand, the South Carolina court reaffirmed itself, notwithstanding this Court's action. Appeal was taken, and this Court reversed. 376 U.S. 776 (1964). Explaining the significance of its vacation of judgment and reversal of the lower court's second decision, the Court stated:

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[256] To the best of our knowledge, this was only the second antitrust case decided summarily by this Court since 1965 in which such mandate has issued. The other, *United States* v. *Continental Oil Co.*, 387 U.S. 424 (1967), arose under Clayton Act § 7. There the Court, on a direct appeal, summarily vacated a district court judgment and remanded for reconsideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966). On reconsideration, the district court in *Continental Oil* reversed itself. 1968 Trade Cases ¶ 72,374 (D.N.M.). On the second direct appeal, this Court summarily affirmed. *Continental Oil Co.* v. *United States*, 393 U.S. 79 (1968).

During the same period, the Court has summarily affirmed in at least 24 antitrust cases brought by the Government.

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration. . . .
>
> The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case. [*Id.* at 776-77 (footnote omitted)].

See McClatchy Newspapers v. *Noble*, 97 S.Ct. 2966 (June 27, 1977), and *Noble* v. *McClatchy Newspapers*, 97 S.Ct. 2972 (June 27, 1977).

NSPE believes that the Court, in vacating the judgment below, intended that the District Court should not slavishly adopt as the *ratio decidendi* of this case a theory, *per se*, never before applied to professional ethics. NSPE believes the Court intended that the District Court should take legal cognizance of the evidence regarding the dangers of bidding in engineering, to the end that the District Court could determine whether "features of [that] profession . . . require that [this] particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb*, *supra*, 421 U.S. at 788 n.17. That is the standard *Goldfarb* makes applicable here.

NSPE believes that the Court recognized that there is no way to do justice in this case without considering the facts.

VI. CONTRARY TO THE GOVERNMENT POSITION AND TO THE CIRCUIT COURT, NSPE SHOULD NOT BE PENALIZED FOR DEFENDING THIS CASE INSTEAD OF SUBMITTING TO JUDGMENT.

A. The System of Justice Cannot Be Offended By Consideration Of The Evidence.

The Circuit Court opinion, and the Government Brief in opposition to certiorari, state that NSPE should be severely treated because it defended this case. The Government suggests that NSPE's refusal to submit to a consent decree should be taken into account—reminding the Court that other professional societies recently pursued by the Government have submitted.[257] (The Government makes this claim knowing full well that consent decrees lack any precedential value.)[258] Similarly, the Circuit Court suggests in its opinion that "the situation might be different", and a decree "more limited in its objectives and restraints" justified, had not NSPE engaged in what the Circuit Court described as "all-out resistance to the lawsuit on the ground that its rules were necessary at the very core for sound regulation."[259] Thus do the Justice Department and a United States Court of Appeals warn litigants in civil cases that if they dare to state a defense, and take appeals, these facts will be cited against them.

The foregoing view, we submit, undermines the adversary system and assaults precious due process rights.

NSPE has done nothing more in this case than state to the courts its defense in the most effective manner known to it. Representing members located in every State, NSPE has sought to obtain the most expedited and

[257] Brief for the United States in Opposition at 9.

[258] 15 U.S.C. § 16(a) (Supp. V 1975).

[259] 555 F.2d at 983, Cert. App. A-10.

definitive judgment possible on an issue it believes to be of paramount public importance. When the District Court peremptorily ruled against NSPE the second time —following this Court's vacation of the first judgment— NSPE sought permission to appeal directly to this Court. The Government objected, and the District Court refused to certify direct appeal,[260] thus requiring the engineering profession to stay in the limbo of appellate review for two additional years.

The principle involved in this case is to NSPE and its members no less compelling than have been the principles involved in every case of national importance to the litigants who brought them here. In every such case, a litigant vigorously and stubbornly resisted the imposition of a rule he thought was wrong or wrongly applied.

Judicial consideration of the evidence in this case cannot offend the system of justice. There could be no more devastating infirmity within the judiciary than the infirmity once described by Dean Pound: "To vindicate a juridical conception, the court shut out the best possible means of information."[261] Professional engineers, who deal with the hard reality of quantifiable, objective, palpable facts, facts which they know implicate public safety, cannot voluntarily accept a lower court ruling based on a "juridical conception" which purposefully excludes those facts.

B. Engineering Ethics Require That Where The Engineer's Judgment Is Overruled By Nontechnical Authority, He Must Point Out The Consequences.

Submission to judgment by NSPE in this case would have involved repudiation not only of the principle of competence but also of another overarching ethical prin-

[260] Cert. App. A-14.

[261] R. Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 620 (1908).

ciple in engineering. As Section 2 of NSPE's Code of Ethics states,

> The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by non-technical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health.[262]

The so-called "all-out resistance" by NSPE to this lawsuit which the Circuit Court criticized was in fact the acquittal of an ethical mandate.

C. NSPE's Defense Is Evidence Of Respect For, Not Disregard Of, The Law.

Defense of this case is predicated on respect for, not disregard of, the law. The engineers must respect the ability of the legal process to reach the correct result here, for ultimately they have no choice. The engineers can no more resist the ubiquity of law than the lawyers can resist the ubiquity of engineering. The lawyers, like everyone else, must respect the ability of the engineering process to reach the correct result, for ultimately we have no choice. When an established method of preserving professional competence in one sphere is attacked in another, reason cannot support abolition of the principle without examination of the attendant perils.

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[262] J. App. 5478.

The engineers' confidence in the inevitability of a correct result in this case rests upon the confidence Senator Sherman had when he stated to the Senate in 1890,

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. 21 *Cong. Rec.* 2460 (1890).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and judgment entered for Petitioner.

Respectfully submitted,

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November 17, 1977

No. 76-1767

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial opinion, findings of fact and conclusions of the district court are reported at 389 F. Supp. 1193 (J.A. 9928).[1] The opinion of the district court following this Court's remand (422 U.S. 1031) for

[1] "J.A." refers to the Joint Appendix in the court of appeals, which is the appendix herein pursuant to the Court's order dated November 7, 1977. "Pet. Br." refers to Brief for Petitioner. "Pet. App." refers to the appendix to the petition. "FP." refers to the district court's findings of fact adopted from those proposed by the plaintiff and "FD." to the separately numbered findings adopted from those proposed by the defendant.

further consideration in light of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, is reported at 404 F. Supp. 457 (J.A. 9985). The opinion of the court of appeals affirming the decision of the district court but modifying its decree in part (Pet. App. A–2) is reported at 555 F. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977. The petition for a writ of certiorari was filed on June 10, 1977 and granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a comprehensive ban on competitive price bidding for engineering services collectively agreed to and enforced by the National Society of Professional Engineers, violates Section 1 of the Sherman Act.

2. Whether the judgment of the district court, enjoining the Society from taking actions or making statements that would have the effect of perpetuating its unlawful ban on competitive price bidding for engineering services, is consistent with the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment provides:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT

In this civil antitrust suit filed by the United States, the district court initially found that petitioner, the National Society of Professional Engineers ("NSPE"), violated Section 1 of the Sherman Act by combining and conspiring with its members and various state engineering societies to eliminate any form of competitive price bidding in the sale of engineering services by means of Section 11(c) of NSPE's Code of Ethics (389 F. Supp. 1193; J.A. 9928–9973). Section 11(c), on its face and as practically applied and enforced, comprehensively bans any form of price competition that permits a prospective client to compare prices for engineering services prior to selection of an engineer.[2] It provides FP. 26; J.A. 9951):

[2] The complaint, filed in December 1972, alleged that the members of NSPE agree to abide by this provision and that NSPE and its members enforce the bidding ban (J.A. 13). The complaint asked for declaratory and injunctive relief against the continued promulgation and enforcement of the bidding ban (J.A. 14–15).

In its answer, NSPE admitted adopting and publishing Section 11(c), but denied all liability (J.A. 16–24).

The parties engaged in extensive discovery prior to trial. During the five-day trial, NSPE called five witnesses (J.A. 1597, 1682,

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> Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . .
>
> * * * * *
>
> He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed

1741, 1958, 2318) and the government called three (J.A. 2049, 2149, 2210). The witnesses testified about the nature of professional engineering and the nature, operation and enforcement of NSPE's ban on competitive bidding. In addition to the testimony at trial, NSPE introduced depositions of twelve individuals (J.A. 27–1528), and both the government and NSPE submitted voluminous documentary evidence.

> work. These principles shall be applied by the Engineer in obtaining the services of other professionals.

While NSPE's direct appeal to this Court was pending, *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, was decided. The Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Goldfarb* (J.A. 9984). 422 U.S. 1031. Upon reconsideration, the district court held that *Goldfarb* supported its analysis and reaffirmed its prior decision (404 F. Supp. 457; J.A. 9985–9990). The court of appeals affirmed the district court's findings of fact and conclusions of law and modified the judgment in one respect (555 F. 2d 978; Pet. App. A–2—A–13) (see pp. 29–31, *infra*). The facts are set forth in the district court's initial findings, 69 of which were adopted with modifications from those proposed by the government (FP. 1–69, J.A. 9944–9964), and 56 from those proposed by NSPE (FD. 1–56, J.A. 9964–9972).

I. NSPE'S BAN ON PRICE COMPETITION

A. NSPE AND THE NATURE OF ENGINEERING SERVICES

NSPE is an organization formed to promote the economic, professional and social interests of engineers (FP. 3, J.A. 9944). It is incorporated and has affiliated state societies and local chapters in every state and territory; a person who joins NSPE simultaneously joins the appropriate state society and local chapter (FD. 11, 12, J.A. 9965).[3] NSPE has approxi-

[3] The converse is also true: an engineer who joins a state society automatically becomes a member of NSPE (FD. 12, J.A. 9965).

mately 69,000 members, 55,000 of whom are registered under the laws of the several states (FP. 2, J.A. 9944).

Approximately 12,000 NSPE members are consulting engineers who provide services for a fee (FP. 4, 19, J.A. 9945, 9949).[4] Consulting engineers are employed by or operate engineering firms that vary in size from one-man firms to publicly held corporations which actively market and promote their services nationwide (FP. 9, 18, 19, 20, J.A. 9946, 9948–9949).[5] Some engineering firms are affiliated with or owned by architectural firms or by other corporations engaged in allied or related fields, such as construction, management and real estate development, and these relationships may result in a very large group of firms controlled by a holding company (FP. 23, J.A. 9950). The majority of consulting engineers are in

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The Board of Directors of the national society is comprised of representatives of the 54 affiliated state societies, who have voting power in proportion to the size of the membership of the state society (J.A. 1753–1754, 2494–2495).

[4] There are approximately 325,000 registered professional engineers in America; roughly half are consulting engineers (FP. 7, J.A. 9945–9946; FD. 10, J.A. 9965).

[5] Although 60 percent of engineering firms employ fewer than five engineers (FD. 6, J.A. 9965), larger firms account for a substantial part of total engineering revenues. For example, in 1972 the 438 largest architectural-engineering design firms accounted for approximately $2.2 billion in fees (FP. 17, J.A. 9948). See also FP. 21, J.A. 9949.

In addition, there are several large "design/construct" firms, which construct projects in addition to doing consulting engineering; the 62 largest design/construct firms in 1972 received contracts totalling $26 billion (FP. 24, J.A. 9950).

practice in five broad areas of engineering (civil, mechanical, electrical, chemical, and mining) and may confine their practice to more specialized areas within these categories (FP. 7, J.A. 9945–9946; FD. 4, 9964–9965).

Engineering services are necessary to the study, design, and construction of all types of structures. "These services include pre-feasibility studies, feasibility studies, planning, preliminary studies, the preparation of drawings, plans, designs, specifications, cost estimates, manuals and reports, consultations, surveys, and inspection. Engineering firms also provide various related services such as soil boring and surveying, reproduction of drawings and specifications, economic and financial surveys and data processing, both for other engineers and governmental or commercial clients" (FP. 11, J.A. 9946–9947). "On occasion, engineering firms sell non-engineering related services such as computer services" (FP. 23, J.A. 9950).

The dollar value of those services is substantial (FP. 19, J.A. 9949). Engineers, usually in conjunction with architects, work on projects worth many billions of dollars. Engineering fees alone amount to 5 to 6 percent of total construction costs, and architect-engineer fees annually total around $4.7 billion (FP. 16, 17, J.A. 9948).

"Many engineering firms actively market and promote the sale of their services to prospective clients" (FP. 20, J.A. 9949). Some firms employ marketing specialists and business development personnel who

seek contacts with individuals, firms and government agencies that might be potential sources of business. Firms distribute promotional brochures to prospective clients describing their operations, past work, capabilities and personnel (FP. 20, J.A. 9949).[6]

B. THE ORIGIN OF THE BAN ON COMPETITIVE BIDDING

NSPE's ban against competitive bidding has a lengthy history; it developed from the organization's Rules of Professional Conduct and Canons of Ethics.[7] These rules and canons express two principal ideas: that it is generally possible for an engineer before being hired to inform clients of the cost of his proposed services; and that it is undesirable for him to do so.

For example, former Rule 50, adopted in 1957, expressly provided that before being hired the engineer "should set forth in detail the work he proposes to accomplish" when asked for such a proposal (J.A.

[6] Examples of these promotional brochures are reproduced at J.A. 8448–8949, 9097–9889.

[7] NSPE formulated and adopted the Rules of Professional Conduct. The Canons of Ethics were formulated by the Engineers Council for Professional Development, a federation of engineering societies concerned with development of rules of ethics, and NSPE adhered to them (J.A. 6241, 7174, 7184, 1833–1834, 1837–1838, 1842).

7182).[8] It warned the engineer to avoid, "if possible," a "statement of monetary remuneration expected" for the job. The rule advised him that if "such a statement be deemed necessary," he should submit a bid "equal to or more than the fees recommended as minimum for the particular type of service required, as established by fee schedules * * *." If no area-wide fee schedule was available, NSPE told its members that it was ethical to price the job "equal to actual cost plus overhead plus a reasonable profit" (J.A. 7182).[9]

In 1961, NSPE amended the Rules to narrow the circumstances in which an engineer ethically could inform a prospective client of his charges. Rule 50, which had previously allowed price quotations where "such a statement be deemed necessary" (J.A. 7182), was changed to permit such information only "[s]hould the owner insist" (J.A. 6380, 6382). Similarly, Rule 50 provided that any price quotation must be limited to "the recognized professional society

[8] Rule 50 also provided that it is ethical for engineers to solicit clients "in the form of a letter or a brochure" advertising the firm's qualifications and past accomplishments (J.A. 7182).

[9] Section 26 of the Canons provided: "[The Engineer] will not compete with another engineer on the basis of charges for work by underbidding, through reducing his normal fees after having been informed of the charges named by the other" (J.A. 7182).

fee schedule for the particular type of service required in the * * * area * * *'" (J.A. 6380, 6382).[10]

In September 1963, the Engineers Council revised its Canons of Ethics and adopted a provision which permitted competitive bidding for professional services when competition is not based on price alone (J.A. 6243).[11] That Canon provided that an engineer

> will not invite or submit price proposals for professional services, which require creative intellectual effort, on a basis that constitutes competition on price alone. Due regard should be given to all professional aspects of the engagement [J.A. 6239, 6243].

NSPE adopted its present Code of Ethics in 1964. During the deliberations, the NSPE Ethical Practices Committee[12] recommended against the adoption of the Engineers Council Canon as not being a sufficiently comprehensive prohibition upon price competition for

[10] Rule 49 was also amended to provide that an "engineer who is requested to submit a competitive bid to an owner or a governmental body should remove himself from consideration for the proposed work" (J.A. 6382; compare J.A. 7182).

After NSPE amended Rules 49 and 50, the Society's Board of Ethical Review ("BER") issued an opinion based on them. BER Case 60–2 (J.A. 2564; compare J.A. 6380).

The provision in Rule 50 stating that solicitation on other than a fee basis is ethical remained unchanged.

[11] This provision, Canon 3.7, was adopted by the American Institute of Mining, Metallurgical, and Petroleum Engineers, and the American Society of Heating, Refrigeration and Air Conditioning Engineers (J.A. 6243).

[12] The Ethical Practices Committee is the official NSPE body which studies and reviews NSPE's ethical standards and recommends revisions of the NSPE Code of Ethics and professional policies to the Board of Directors (J.A. 2508, 1766–1768).

engineering services (J.A. 6242–6245). As a result of this recommendation and the overwhelming support of NSPE members who commented on the proposal, the NSPE Board of Directors adopted Section 11(c) in July 1964 (J.A. 6242–6245, 6263, 6487).

C. THE SCOPE AND OPERATION OF THE BAN ON COMPETITIVE BIDDING

The district court found that for most of the period charged in the complaint (July 1966 to July 1972), the ban applied " 'to all services provided by a professional engineering firm' " (FP. 28, J.A. 9952). In 1966, the NSPE Board of Directors adopted Professional Policy 10–F,[13] which so provided (J.A. 5766,

[13] NSPE Professional Policies are adopted by its Board of Directors, usually upon recommendation of the Ethical Practices Committee, and constitute guidelines to supplement and define the Code of Ethics for the conduct of its members and their firms (J.A. 785–786, 2508, 1766–1768).

Professional Policy 10–F supplemented a 1962 Board of Ethical Review opinion that Rules 48 to 51 and Canon 26 do not apply to research and development contracts ("R & D") (J.A. 2599–2600). The Board of Ethical Review reconsidered the R & D question in 1971. At first, an opinion was drafted to permit engineers to submit price proposals for R & D and study contracts (J.A. 5727–5732). One BER member opposed this on the ground that such a retreat from NSPE's total opposition to price competition for engineering services was inadvisable because "we must not give an inch, * * * if we do the bid boys will take another inch, then another * * * to cave in to allow firms to bid for anything will ruin our chances for corrective legislation, prejudice our situation with the Government Procurement Commission * * *" (J.A. 5733). BER approved a revised opinion that made it unethical for an engineer to submit a price proposal for nondesign study contracts (J.A. 5734–5736).

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7275). The district court found that NSPE's purpose in adopting that all-encompassing policy was to " 'make it clear beyond all doubt that NSPE opposes competitive bidding by engineers in private practice for any service performed by an engineer or firm in private practice' and to avoid suggesting 'loopholes' to the membership" (FP. 28, J.A. 9952, 5766). NSPE interpreted Policy 10–F as prohibiting bidding for blue-printing services and for the lease of spare computer time, as well as for surveying, drafting and soil testing services (J.A. 6282–6284, 6442, 6579, 6586, 5862). NPSE's General Counsel advised its members that

> if a firm wishes to engage in a service which requires competitive bids it should do so through an organization with a different name and identification not implying that it is a consulting engineering firm. This would apply, for example, if a firm wished to do a research and development job for the Government, which requires price submissions prior to selection of the contractor [J.A. 6445].

In July 1972, NSPE revised its interpretation of the scope of the bidding ban to exclude work involving "special studies" or research and development ("R & D").[14] In the late 1960s and early 1970s demand by state and federal governments for special studies of a research and development nature increased rapidly. This increase appeared likely to

[14] The revised interpretation of Section 11(c) is set forth in Professional Policy 10–G (J.A. 2445).

continue. Such R & D work was financially attractive, not just to engineering firms but also to non-architectural-engineering ("non-A-E") firms, such as research institutions, management consultants, and industrial firms that wanted such business and were accustomed to bidding for their work (J.A. 5738).

NSPE found itself in a dilemma. On the one hand, NSPE and other A-E societies recognized that they would either have to revise their comprehensive ban on competitive bidding to meet competition from non-A-E firms or "abdicate" the whole R & D field to those firms (J.A. 5737, 5741; see also 6530–6531, 6263, 2075–2079). They also realized that "[i]f A-E's abdicate the 'Special Studies' field, the non-A-E's handling that field will soon extensively invade the 'Conventional Services' field" (J.A. 5741). On the other hand, NSPE believed that "[o]f all classes of work, * * * R&D is the least appropriate for bidding. By the very nature of it, it doesn't have a real definite outline, a well-defined beginning and end * * *" (J.A. 6531; see also. J.A. 5739, 1874–1875, 2019, 2068–2070, 2075, 2081–2082, 2178–2179).

The principal NSPE study of whether Section 11 (c) should prohibit price proposals for R & D work contrasted the routine, repetitive nature of engineering services with the unique, difficult nature of R & D projects (J.A. 5739).[15] Nevertheless, NSPE in the

[15] The study showed that, "[i]n the case of special studies, the scope, level of effort, required approach, and necessary steps are unique to each project and do not follow a general pattern." The

face of the threat of competition from non-A-E firms, resolved its dilemma by revising its ban on competitive bidding to exclude the R & D area (J.A. 2445, 5737, 5748–5749).

D. THE SWEEPING CHARACTER OF THE BAN ON COMPETITIVE BIDDING

Under the revision of July 1972, Section 11(c) covers all "professional services associated with the study, design and construction of real property improvements * * *" (FD. 56, J.A. 9972). These services are defined broadly to include "pre-feasibility and feasibility studies, comprehensive and general planning, preliminary studies, preparation of drawings, plans, designs, specifications, cost estimates, other studies and preparation of manuals and reports, consultations, performance of surveys, inspection and development related to the preceding categories" (FD. 56, J.A. 9972).

Section 11(c) applies no matter how simple the project, how expert the purchaser, or how thoroughly the engineer has been able to study the project before quoting a price. The ban applies even though NSPE has ruled that after selection, engineers may charge less than state society schedule of minimum fees for

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study recognized that in contrast, "[c]onventional services usually apply to customary types of assignments" and "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach, and necessary steps are generally known" (J.A. 5739). NSPE distributed this study to several national A–E societies, to all members of NSPE's Board of Ethical Review and to numerous NSPE officials in connection with their consideration of the R & D bid problem (J.A. 5746, 5747–5748, 6432, 6439, 6441, 1353).

work that is so repetitive that it "permits him [the engineer] to use the same design as had been used in a previous project" (FP. 41, J.A. 9955).

Typically there have been substantial numbers of similar projects in which the "scope of effort, approach and necessary steps" are known to the engineer (J.A. 5739, 1722, 1881–1882.) [16]

Although NSPE recognizes that engineering customers include persons with technical sophistication (J.A. 5739), the district court found that Section 11(c) bars even clients who are engineers from soliciting price information (FP. 30, J.A. 9953).[17]

Under Section 11(c) no fee information that can be compared to that of another engineer may be given to any prospective client. This includes any "cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost" (J.A. 9939). The sole exception is

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[16] In a study prepared for the Committee on Federal Procurement of Architect-Engineer Services (COFPAES) to consider the effect on engineers of increasing competition from non-engineers for special studies or research and development projects, it was recognized that for more traditional services "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach, and necessary steps are generally known. Because of this, published fee guides have been prepared in forms such as ASCE [American Society of Civil Engineers] Manual 45. Conventional services are usually not a problem from the standpoint of competitive bidding, because it is possible for the client to refer to the fee guides for an idea of the level of effort or range of cost for the A–E [architect-engineer] services. [J.A. 5739]."

[17] Section 11(c) expressly prohibits engineers from requesting, as well as providing, price information (FP. 30, J.A. 9953).

the provision in Section 11(c) that provides that members may disclose "recommended fee schedules prepared by various engineering societies * * *" (Section 11(c), FP. 26, J.A. 9951).

Deviations from the fees set forth in state or local fee schedules violate Section 9(b) of the Code (FP. 31, 32, 39, 40, J.A. 9953, 9955). Section 9(b) provides:

> Section 9—The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work . . . .
>
> b. He will not undertake work at a fee or salary below the accepted standards of the profession in the area [FP. 39, J.A. 9955].[18]

Sections 11(c) and 9(b) together allow the prospective client only such price information as he can

[18] In addition to Section 9(b) of the Code, NSPE has promoted the use of fee schedules in its Guide for Professional Engineer's Services. The Guide provides: "The recommended fees for mechanical and electrical engineering services rendered for Architects and other Engineers should be as follows: When an Engineer furnishes service to another Engineer or an Architect the fee for such services should reflect the acceptable fee for the area in which the service is rendered. Where State minimum fee schedules are available, these should be used [J.A. 5490]." The Guide states that even fees for reproducing documents are to be based on the state society's fee schedule. Where the cost of reproducing documents is borne by the mechanical or electrical engineer, "his fee should not be less than 85% of the fee received by the Prime Design Professional * * *" (J.A. 5490). This percentage is in turn "based on the assumption that the principal Design Professional's fee complies with the minimum recommended fee schedule of his particular professional group" (J.A. 5490). The NSPE Guide contains a list of state fee schedules and addresses where copies can be obtained (J.A. 5493). Contrast Pet. Br. 40, n. 182.

glean from the "uniformly regular fee schedule" prepared by the state society (J.A. 9940).[19]

Should a client persist in requesting a price other than the state or local society's fee schedule prior to the start of negotiations, Section 11(c) requires that the engineer "withdraw from consideration for the proposed work" (FP. 26, 30, J.A. 9951, 9952–9953). Thus, the prospective purchaser of engineering services must select one engineering firm with whom to negotiate, solely on the basis of background and reputation and, except for the state or local society's recommended fee schedule, in ignorance of the cost of those services (J.A. 9930; FD. 45, J.A. 9970).

E. NSPE'S ENFORCEMENT OF THE BAN ON COMPETITIVE BIDDING

1. The district court found that the provisions of the Code of Ethics are "binding rules enforced by NSPE and its state societies" (FP. 52, J.A. 9959). Apparent violations of the Code are usually referred to the state society that has primary responsibility for disciplining members for ethical violations (FP. 52, J.A. 9959–9960; FD. 34, J.A. 9968). Provisions in the constitutions of NSPE and its state societies provide for censure, suspension, and expulsion for violations of the Code, and any such action by a state society auto-

[19] The district court stated that the legality of the fee schedules was not an issue in this case, but that "insofar as the use of fee schedules by defendant's members might affect the impact which Sec. 11(c) has on trade and commerce, an inquiry into their promotion and enforcement by defendant is plainly relevant" (J.A. 9940 n. 3).

matically applies at the national and local levels of the NSPE organization as well (FP. 52, J.A. 9959–9960).

A determination that an engineer has violated the Code not only can result in NSPE or state society sanctions, but generally is damaging to the engineer's professional standing (FP. 52, 55, J.A. 9959, 9960). Engineers are concerned about their reputations among their colleagues and generally seek to conduct their work in accordance with the Code (FD. 37, J.A. 9969).

NSPE also recommends procedures to be followed by state societies when charges of unethical conduct are filed against an NSPE member at the state society level (FP. 53, J.A. 9960). These include procedures for interstate cooperation by state societies in instances where alleged misconduct occurs in one state by members of another state society (FP. 53, J.A. 9960). Although NSPE does not have the power to compel an affiliated state society to take any action—although it may withdraw the state society's charter of affiliation—the national society's suggested procedures represent the typical disciplinary practices of the state societies (FP. 53, J.A. 9960; FD. 13, 15, J.A. 9966).

2. NSPE has promoted and coordinated the enforcement of Section 11(c) of its Code of Ethics by its state societies (FP. 56, J.A. 9960). An example related to the construction of the Tri-State Airport in West Virginia. Tri-State Airport Authority in Huntington,

West Virginia, solicited proposals from engineering firms for an airport runway extension project (FP. 56, J.A. 9960–9961). The Authority initially chose one firm by the traditional selection process, but it viewed the $500,000 fee quoted by the firm as excessive. It then requested price proposals from five firms selected as best qualified. Three of them submitted fee proposals (FP. 56, J.A. 9960–9961).

Several of the engineering firms that had been involved initially brought the request for price proposals to the attention of the West Virginia Society of Professional Engineers, which in turn relayed the complaints to the chairman of the Professional Engineers in Private Practice division ("PEPP") of NSPE (FP. 57, J.A. 9961).[20] The PEPP chairman sent telegrams to each of the five engineering firms, reminding them that there were "[v]alid reasons in addition to Code of Ethics, for refusing to enter into competitive bidding" and "[s]trongly" urging them to withdraw (FP. 58, J.A. 9961).[21] He also wired the president of the Tri-State Airport Authority, asking that he withdraw the request for fee proposals (FP. 58, J.A. 9961).

As a result of the telegram, one of the engineering firms withdrew its fee estimate and notified NSPE of its action (FP. 59, J.A. 9962). The Authority subse-

[20] PEPP is a division of NSPE which is devoted to serving the interests of consulting engineers (J.A. 6948).

[21] The telegram also pointed out that participation weakens the position of NSPE/PEPP in an effort to halt use of competitive bidding procedures by federal agencies (FP. 58, J.A. 9961).

quently awarded the contract to a firm which had quoted a $300,000 maximum fee, thus reducing its engineering cost by $200,000 (FP. 61, J.A. 9962).

On January 12, 1972, the PEPP Board of Governors directed the PEPP Executive Board to investigate the Tri-State Airport incident " 'and take appropriate action thereon on behalf of NSPE/PEPP' " (FP. 62, J.A. 9962). PEPP's chairman called a special meeting of national directors and presidents of member societies in the four states in which the firms suspected of having submitted price proposals were located (FP. 62, J.A. 9962). At this meeting, the chairman indicated that NSPE expected the state societies to enforce the NSPE Code (FP. 63, J.A. 9962).

It was decided that PEPP would coordinate an investigation of the incident by holding a hearing with five firms and their state societies (FP. 63, J.A. 9962). NSPE officials believed the investigations would " 'demonstrate to all observers that we can and will keep our own house in order' and that if no action were taken at this time 'the situation will crop up again and again' " (FP. 63, J.A. 9963). The NSPE membership was to be advised of this investigation " 'so that all of the members of the Society * * * recognize that we intend to enforce our code of ethics when cases are brought to our attention' " (FP. 64, J.A. 9963).

At the hearing, the firms were questioned about their participation in the Authority's selection procedure and at the conclusion the state societies were

advised that any action against the individual firms was their responsibility (FP. 66, J.A. 9963–9964). At least three NSPE state societies conducted further investigations (FP. 66, J.A. 9964).[22]

3. NSPE organized its members in a successful attempt to frustrate an experimental and limited competitive bidding program by one of the most sophisticated purchasers of engineering services, the United States Department of Defense. The court of appeals summarized the district court's findings concerning these efforts as follows:

> * * * [P]requalified engineering firms were invited to submit two sealed envelopes separately containing a technical proposal and a non-binding price estimate. The technical proposals were to be opened and evaluated by a

[22] The district court recognized that this was but one example of NSPE's enforcement activity (FP. 56, J.A. 9960). Other instances of NSPE enforcement activity in conjunction with its state societies included its activities to prevent competitive bidding for the following engineering projects: a bridge project for the Mississippi River Bridge Authority (J.A. 6104–6111); a sewage treatment facility in Fall River, Massachusetts (J.A. 6156–6160); a feasibility study for sewage, water and storm drainage facilities in Calhoun County, Michigan (J.A. 6173–6180); an electrical engineering study for the Lyons, New Jersey, Veterans Administration Hospital (J.A. 6222–6228); water and sewer projects for Northampton and Halifax Counties in North Carolina (J.A. 6161–6168); engineering services for modernization of the water treatment facility in Ellwood City, Pennsylvania (J.A. 6150–6153, 1884–1885, 1890–1892); an engineering project for the New York Metropolitan Transit Authority (J.A. 6112–6125, 6127–6135, 6138); and a mine water drainage project for Harrison County Water Improvement Group (J.A. 6201–6202, 6204–6221, 1886–1887, 1890–1891).

selection board on the basis of their technical competence. Then the envelopes containing the price estimates were to be opened and a determination made as to whether price considerations warranted a change in the ratings of the proposals. The test procedure was to be conducted for a period of only one year, and in only two military construction districts. Despite the relative sophistication of the purchaser, the extensive provision for consideration of factors other than price, and the limited nature of this experiment, the Society advised its members that the DOD test procedure was unethical and urged them not to submit price information. As a result, the Department of Defense was unable to obtain price proposals under the test procedure [Pet. App. A–9 – A–10; see also FP. 46–51, J.A. 9957–9959].

F. THE ECONOMIC PURPOSE OF THE BAN

The economic purpose of the ban was revealed in NSPE's promotional program to restrict price competition. In 1966, NSPE instituted a program to educate all professional engineers about the evils of competitive bidding (FP. 33, 34, J.A. 9953). As part of this effort, members of NSPE's PEPP section gave speeches telling NSPE members that "price competition could only result in the lowering of engineering fees" (FP. 35, J.A. 9953).

NSPE also prepared and distributed pamphlets on competitive bidding to its members and to purchasers of engineering services (FP. 34, 36, 37, J.A. 9953–9955). NSPE's General Counsel and Director of

Professional Services advised that in preparing the pamphlet directed to engineers in private practice, NSPE "should try to have it emphasize the pocketbook interests of the consultant by pointing out that in the long run he reduces his own fee capability by bidding * * *" (J.A. 6300). The General Counsel was of the view that NSPE would have "more impact through the 'selfish' approach" (J.A. 6300). The pamphlet distributed to engineers in private practice warned them that "[s]ome firms have already been forced out of business due to financial failure caused by competitive bidding" (J.A. 6304; FP. 36, J.A. 9954).

The purpose of the ban also was shown by the promulgation and repeal of an amendment to Section 11(c) known as the "When-in-Rome" clause (J.A. 6487). In July 1966, NSPE amended Section 11(c) to permit members to submit competitive price proposals for engineering work in foreign countries where such proposals were required in order to be considered for the work. This amendment [23] was adopted at the request of NSPE's Professional Engineers in Private Practice ("PEPP") section in order to "reflect a

[23] The clause reads: "When engaged in work in foreign countries in which the practice is to require the submission of tenders or bids for engineering services, the Engineer shall make every reasonable effort to seek a change in the procedure in accordance with this section, but if this is not successful the Engineer may submit tenders or bids as required by the laws, regulations or practices of the foreign country [J.A. 6487]."

The American Society of Civil Engineers ("ASCE") had a similar exception in its Code of Ethics (J.A. 401–402).

realistic problem" and permit United States engineering firms to obtain jobs in foreign countries without violating Section 11(c) of the Code of Ethics (J.A. 6340, 6579, 1809–1811, 401–402).

NSPE, however, found that the clause was an embarrassment in its effort to stop competitive bidding in the United States. As the PEPP Section Committee observed (J.A. 9890):

> This is a poor time to have such a policy with GAO pressures for competitive bidding of U.S. Government work. How can we explain satisfactorily to GAO why OK to bid on overseas work but not on domestic work? [24]

Accordingly, NSPE abolished the "When-in-Rome" clause in 1968 (J.A. 6344).

II. THE COMPETITIVE IMPACT OF THE RULE

The district court and the court of appeals found that the language, purpose and effect of Section 11(c) was to maintain prices.

The district court found that the rule prohibits members from "engaging in any form of price competition when offering their services" (J.A. 9939). As a result, "the only price information available for input into the client's selection equation is a

[24] The PEPP section agreed with its Committee, recommending that the clause be deleted in order to prevent NSPE's opposition to competitive bidding from being "chipped away, piece by piece" (J.A. 6351).

uniformly regular fee schedule" (J.A. 9940). "[T]he agreement among [petitioner's] members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining price * * *. The ban narrows competition to factors based on reputation, ability and a fixed range of uniform prices. The prospective client is thus forced to make his selection without all relevant market information" (J.A. 9941).

The court of appeals observed that the ban applies without regard to "the sophistication of the purchaser, the complexity of the project, or [the sophistication of the] procedures for evaluating price information" (Pet. App. A–9). It impairs economic decisionmaking because, as the district court found, "[w]ithout the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice" (J.A. 9988). In consequence, the court of appeals stated, the case involves "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers. In that context, the absolute rule is fairly identified as a price-sustaining mechanism" (Pet. App. A–12).

III. THE PROCEEDINGS BELOW

A. THE FIRST DECISION OF THE DISTRICT COURT

The district court, after evaluating the testimony and the extensive documentary evidence, found that

NSPE's agreement "is in every respect a classic example of price-fixing" and constitutes a *per se* violation of Section 1 of the Sherman Act (J.A. 9941). The court also found that "NSPE and its members actively pursue a course of policing adherence to the competitive bid ban * * *" (J.A. 9940).[25] The court held that the sale of engineering services is trade or commerce subject to the Sherman Act (J.A. 9934–9938). It ruled that NSPE's price-fixing is merely a private agreement "formulated outside the command and supervision of a state agency" which is not exempt "state action" (J.A. 9943).

The court's judgment enjoined NSPE from participating again in a similar restraint of trade (¶ VI, J.A. 9975); ordered it to strike from its official documents any provisions discouraging the submission of price quotations for engineering services and any fee schedules (¶¶ V and VI, J.A. 9975–9976) barred it from adopting or disseminating any official statement stating or implying that competition based on fees is unethical (¶ VII, J.A. 9976) directed the publication of the judgment in various NSPE publications, as well as a statement that NSPE does not consider the submission of price quotations at any time unethical (¶ VIII, J.A. 9976–9977); and directed NSPE to revoke the charter of any state engineering society which discouraged price competition in engineering (¶ IX, J.A. 9977–9978).

NSPE appealed to this Court. While the appeal was pending, the Court on June 16, 1975, decided

[25] These findings are summarized at pp. 17–25, *supra*.

Goldfarb v. *Virginia State Bar*, 421 U.S. 773. One week later the Court vacated the judgment in this case and remanded for further consideration in light of *Goldfarb. National Society of Professional Engineers* v. *United States*, 422 U.S. 1031 (J.A. 9984).[26]

B. THE SECOND DECISION OF THE DISTRICT COURT

After reconsideration,[27] the district court issued a second opinion (404 F. Supp. 457, J.A. 9985). It observed that "[i]n determining that the fee schedule in *Goldfarb* constituted a price fixing practice," this Court had emphasized "the nature of the restraint, the enforcement mechanism, and the fee schedule's adverse impact upon consumers" (J.A. 9987). Guided by this Court's analysis in *Goldfarb*, the district court reiterated its findings with respect to these three aspects of NSPE's ban on competitive bidding and held that "the combined character, enforcement, and effect of NSPE's bidding ban constitute a classic illustration of price fixing under *Goldfarb*" (J.A. 9988).

The court further held that NSPE's bidding ban is "not an advisory measure," but rather is "an absolute prohibition on price competition among defendant's members," which they actively promote and enforce and to which they uniformly adhere (J.A.

[26] The Court had previously denied NSPE's motion for expedited consideration together with the *Goldfarb* case. 420 U.S. 905.

[27] On remand the parties agreed that a further evidentiary hearing was unnecessary, and they submitted briefs and presented oral argument concerning the implications of the *Goldfarb* decision.

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9987–9988). The court also emphasized that "[t]he ban clearly impedes the ordinary give and take of the market place" and " 'tamper[s] with the price structure of engineering fees' " (J.A. 9987).

The court rejected NSPE's contention that price restraints in the engineering profession should be assessed under the rule of reason rather than by the *per se* rule applied to other businesses and professions. It held (404 F. Supp. at 461; J.A. 9989–9900; footnote omitted):

> First, such a construction would substantially undermine the *Goldfarb* Court's denial of a total or partial exemption from antitrust regulation for professions. Neither the nature of an occupation nor any alleged public service aspect provides sanctuary from the Sherman Act. *Goldfarb, supra,* 421 U.S. at 787, [95 S. Ct. 2004]. Second, *Goldfarb* does not rest upon a rule of reason analysis. The Court found price fixing activities and condemned them outright. Third, Footnote 17[28] apparently distinguishes between a profession's business aspects and its valid self-regulatory "restraints," such as membership requirements or standards of conduct.

[28] Footnote 17 of the *Goldfarb* opinion states (421 U.S. at 788–789): "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today."

> Price fixing, however, receives no privileged treatment when incorporated into a code of ethics. Fourth, the activities at issue here have a wide-ranging commercial impact and therefore are to be judged by normal antitrust standards applicable to business practices. Fifth, while NSPE claims that its ban on competitive bidding protects public safety and health, the Supreme Court in *Goldfarb* had before it and rejected similar arguments aimed at preventing "cheap but faulty work" by professionals. The age-old cry of ruinous competition, competitive evils, and even public benefit cannot justify price fixing.

Again the district court entered judgment for the government.[29]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals unanimously affirmed (Pet. App. A–2-A–13). The court held that the district court's findings of fact were not clearly erroneous, and agreed with most of its legal reasoning (*id.* at A-5). It ruled that "in both legal and practical consequence," petitioner's prohibition of free price competition is "not far removed" from price fixing (*id.* at A–7), and that its "prohibition of competitive

[29] At the oral argument on November 7, 1975, counsel for NSPE fleetingly referred to a desire for a hearing "on the form and content of the decree" (Tr. 51). Although the United States did not object to such a hearing and the district court expressed no unwillingness to hold one, counsel for NSPE did not pursue the matter further, either in the ensuing three weeks leading to entry of judgment or thereafter.

bidding, by blocking the free flow of price information, strikes at the functioning of the free market" (*ibid.*). Such a ban, the court concluded, is "at least presumptively condemned in a way that does not apply to other trade practice rules" (*ibid.*).

The court pointed out that the district court had not simply evaluated Rule 11(c) on its face, but had taken "into account how it had operated in fact, and with what practical anticompetitive consequences" (*id.* at A–7-A–8). Because of the nature of the restraint, which has a "universal sweep" (*id.* at A–7), the court of appeals concluded that the district court was not required to balance the claimed benefits against the competitive burdens of the rule (*id.* at A–8).

The court also held that the district court had correctly carried out its responsibility, under this Court's remand, to reconsider the case, and "that although *Goldfarb* was not a square holding absolutely in point * * * its major thrust was in accord with the district court's decree" (*ibid.*).

The court disavowed any suggestion that there is "no room in antitrust laws for ethical rules * * * to prevent harm to the lay consumer and [the] general public" (*id.*, at A–8-A–9). But it held that petitioner's proffered rationalization for the rule—"avoiding dangers to society" (*id.* at A–12)—does not justfy a broad ban on all price competition where there are no such dangers (*ibid.*), and without regard to the purchaser's sophistication, the project's complexity or price evaluation procedures (*id.* at A–9). A ban

of such scope, the court ruled, does not come within the limited doctrine that permits restrictions "narrowly defined in terms of intended social benefits notwithstanding potential effect on price" (*id.* at A–11). While that doctrine may be applicable "to ethical rules of professional associations narrowly confined to interdiction of abuses," this case does not involve that situation (*id.* at A–11-A–12).[30] The court approved the district court's conclusion that the rule as written and applied is illegal *per se* because it is "classic price-fixing" (*ibid.*).

With respect to the judgment, the court held that the case involved an "all-out interdiction of price information for the client who has not selected its engineer, and this warrants a firm remedial decree" (Pet. App. A–10). The court affirmed the district court's decree, except in one respect which it found to be overbroad.[31]

SUMMARY OF ARGUMENT

I

The courts below found that Section 11(c) of NSPE's Code of Ethics totally bans all price compe-

[30] The court noted that "[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree" (Pet. App. A–10).

[31] The court held the provision of the decree that orders the Society to state that it does not consider competitive bidding to be unethical, violates the First Amendment because it was "more intrusive than necessary to achieve fulfillment of the governmental interest" (Pet. App. A–12). The United States does not contest this holding.

tition in the selection of engineers by clients. This determination was made on the basis of an assessment of how the rule operated in fact and with what practical anticompetitive consequences. The rule totally blocks any information by which clients might make price comparisons and is thus fairly identified as a price-sustaining mechanism, not an ethical standard designed to protect the public. Since it is "a classic illustration of price fixing" (*Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 783), it is illegal *per se.*

Because price competition is central to the functioning of a free market, this Court has rejected claims that competitors may privately combine to eliminate it, without elaborate inquiry into possible justifications. That principle applies to the total suppression of price competition in this case, which denied consumers any opportunity to consider price in making their selection of engineers, and crippled the ability of engineers to sell their services in accordance with their own judgment.

NSPE claims that Rule 11(c) permits price competition after the selection of an engineer. Post-selection negotiation, however, is simply bargaining; price competition requires an opportunity for a pre-selection comparison that takes price into account.

A. The NSPE ban is not justified by the nature of engineering services. NSPE's contention that engineering customers will be best served if they are unable to compare prices is as invalid under the Sherman Act as it is under the

First Amendment. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 427 U.S. 748–770.

After carefully reconsidering its judgment in the light of *Goldfarb* v. *Virginia State Bar,* the district court correctly concluded that nothing in it suggests that a total ban on price competition imposed by members of a learned profession is not to be condemned under the *per se* rule. On the contrary, *Goldfarb* held that minimum fee schedules for lawyers were "a classic illustration of price fixing" (421 U.S. at 783). While *Goldfarb* leaves open for future determination the extent to which, apart from price fixing, particular professions may collectively adopt and enforce ethical standards aimed at assuring high professional standards of service, and at preventing overreaching or breach of confidence, this case does not involve such a rule. It involves a total suppression of price competition. If an exemption from the Sherman Act's prohibition of price maintenance is to be created for the marketing of engineering services, Congress must do so. The Brooks Act, 86 Stat. 1278, 40 U.S.C. (Supp. II) 541–544, does not authorize concerted suppression of price competition by engineers.

B. Price competition for engineering services is feasible and practical. This is shown by the fact that engineers' services are sufficiently routine in many instances to be incorporated into recommended minimum fee schedules, and that price competition is

considered by NSPE to be ethical insofar as research and development contracts are concerned.

Price competition in the offering of engineering services will not endanger public safety. NSPE's practice with respect to research and development contracts, its past rules of professional conduct, which previously permitted the disclosure to a client of the cost of services prior to selection, and its allowance of price competition abroad, undermine its claim. NSPE's claim that public safety justifies the total elimination of price competition proves too much, since it would justify the elimination of price competition in large segments of the economy in which public safety is essential—*e.g.*, construction contracts, and the supplying of commodities such as food and drugs.

There are many safeguards other than the suppression of price competition to assure high quality engineering work. The profession is closely regulated by the states through the licensing process. It is also unlikely that engineers will sacrifice public safety for personal profit in view of the traditions of their profession, which make safety a primary duty of each engineer, and the importance to professional success of a good reputation. The substantial risk of legal liability, both in tort and under local construction codes, if unsafely engineered structures cause injury, provides engineers with practical incentives to concern themselves with public safety.

Moreover, there is no objective evidence that competitive bidding or price comparison by engineering clients leads to unsafely engineered structures. On the

contrary, the courts below, after carefully examining the nature and operation of Rule 11(c), correctly found it to be nothing more than "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12).

II

The judgment bars NSPE from continuing to maintain and enforce an official policy that prevents engineers from engaging in price competition. It does not violate NSPE's First Amendment rights, since it is carefully tailored to the district court's findings that Rule 11(c) is an illegal agreement restraining price competition.

The judgment does not prohibit NSPE from persuading governmental bodies to adopt anticompetitive policies. NSPE's violation did not rest upon such evidence, but upon its "all-out interdiction" against furnishing price comparison information to consumers of engineering services (Pet. App. A–10).

ARGUMENT

I. NSPE'S BAN ON COMPETITIVE BIDDING IS ILLEGAL PER SE UNDER SECTION I OF THE SHERMAN ACT

The district court found—a finding the court of appeals upheld and which NSPE does not challenge—that Section 11(c) of NSPE's Code of Ethics totally bans all price competition among engineers seeking to be selected by clients to furnish engineering services.

In so finding, the district court did not merely examine the language of that section but, as the court of appeals noted (Pet. App. A–7 – A–8), "[i]t assessed the rule by taking into account how it had operated in fact, and with what practical anticompetitive consequences." Those consequences included an "all-out interdiction of price information for the client who has not selected its engineer" (*id.* at A–10), which "by blocking the free flow of price information, strikes at the functioning of the free market" (*id.* at A–7).

There is no question that if this complete ban on competitive bidding had been adopted and enforced by ordinary commercial entities, it would have been illegal *per se* under Section 1 of the Snerman Act. See pp. 37–43, *infra*. The question is whether the practice is excepted from *per se* condemnation because the price-fixing related to the services of members of a learned profession. NSPE argues that because the services its members supply are professional, its ban on competitive bidding is not subject to the normal rules governing price fixing, but is to be evaluated under the rule of reason that governs restraints generally viewed as not likely to be inherently pernicious.

NSPE contends that its competitive-bidding ban is necessary to protect engineering clients from deception and the public from unsafely engineered structures that allegedly would result from competitive bidding for engineering services. The court of appeals properly rejected that contention, on the

ground that the restraint is in fact "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12). The court correctly concluded that, "having regard to its language, purpose and effect," this "absolute rule is fairly intended as a price sustaining mechanism" (*ibid.*), not an ethical standard designed to protect the public.

In short, NSPE's absolute ban on competitive bidding, like the minimum fixed fee schedules of lawyers involved in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 783, "constitute[s] a classic illustration of price-fixing" that is illegal *per se.* Both the district court and the court of appeals correctly so held. The various justifications that NSPE offers for its price-fixing activities do not warrant excepting them from *per se* illegality.

A. RULE 11(C) IS ILLEGAL *PER SE* BECAUSE IT ELIMINATES ALL MEANINGFUL PRICE COMPETITION AMONG PROFESSIONAL ENGINEERS IN THE MARKETING OF THEIR SERVICES

Agreements among competitors to fix or stabilize prices, to eliminate or limit price competition, or otherwise to tamper with the pricing process, are illegal *per se* under Section 1 of the Sherman Act "because of their pernicious effect on competition and lack of redeeming virtue" (*Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5). This Court uniformly has rejected claims that actions by competitors

eliminating or limiting price competiton were reasonable [32]—and has done so "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use" (*ibid.*). Price competition is "the central nervous system of the economy" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59), and "interference with the setting of price by free market forces is unlawful *per se*" (*United States* v. *Container Corp.*, 393 U.S. 333, 337).

Price is so "critical" and "sensitive" to our economy (393 U.S. at 338) that, as the court of appeals stated (Pet. App. A–7), "a rule that operates to prevent price competition stands at least presumptively condemned in a way that does not apply to other kinds of trade practice rules." Indeed, "limitation[s] or reduction[s] of price competition" are within the ban of *per se* illegality even though "some price competition" continues (*Container, supra,* 393 U.S. at 337, 338). Price-fixing agreements not only create a price system that partially or totally denies consumers the opportunity to consider price in making their economic choices, but also "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment" (*Kiefer-Stew-*

[32] See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223; *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485. See, also, *United States* v. *Container Corp.*, 393 U.S. 333, 337; *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, slip. op. 21, n. 28.

art Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213).[33]

These considerations apply to the complete ban against price competition in Rule 11(c). The district court found, in sum, that NSPE and its members have combined to impose on the public, before an engineer is selected, a flat prohibition on engineers' disclosure to potential clients of any price information other than uniform recommended fee schedules. The ban applies no matter how simple and repetitive the work, how expert the purchaser, or how thoroughly the engineer has been able to study the project before quoting a price. (See Statement, *supra,* pp. 14–17.) These findings support the district court's ultimate findings that the restraint "prohibits defendant's members from engaging in any form of price competition when offering their services," restricts "the free play of market forces from determining price," and generally "has the intent and effect of eliminating price considerations as a competitive factor in the supplying of engineering services" (J.A. 9939–9941). The trial court's findings, which the court of

[33] Contrary to NSPE's contention (Br. 52–53), *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, did not undermine the rule that price-fixing, or the total suppression of price competition, is illegal *per se*. That case involved vertical territorial restrictions imposed by a manufacturer on its franchisees. In holding that such restrictions should be judged under the rule of reason, rather than the *per se* doctrine, the Court emphasized that "we are concerned * * * only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy" (slip. op. 15, n. 18).

appeals affirmed, establish *prima facie* the *per se* illegality of NSPE's ban on competitive bidding. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508.

The purpose of the ban is to maintain price. This is shown by its universal, unqualified application, and by the history of its adoption, promotion, amendment and enforcement. As the district court found and as the record shows, the ban is substantially motivated by pocketbook interests (see Statement, *supra,* p. 22-24), and "has as its purpose and effect the excision of price considerations from the competitive arena of engineering services" (J.A. 9941). As the court of appeals correctly observed: "the absolute rule is * * * identified as a price-sustaining mechanism * * * that at its core 'tampers with the price structure'" (Pet. App. A–12; footnote omitted).

On its face the prohibition forbids engineers from disclosing any "measure of compensation whereby the prospective client may compare engineering services prior to the time that one engineer, or one engineering organization has been selected for negotiations" (Statement, *supra,* p. 4). NSPE contends (Br. 13, 14) that the provision restricts price competition only until the client makes an "initial, tentative" selection of an engineer. But that is a critical point in the selection of an engineer. For various practical reasons—usually relating to the time and expense—the initial selection is generally the final selection (J.A. 802). Post selection negotiation is not a meaningful substitute for a pre-selection comparison that takes

price into account.[34] It is bargaining, not price competition.

The NSPE ban on competitive bidding is designed and applied to keep potential clients in ignorance of all price comparison data, which often is the critical factor for determining the choice of a supplier of services or goods. Competition for the client's business is restricted "to factors based on reputation, ability, and a fixed range of uniform prices" (J.A. 9941). "Since engineering services are indispensable to almost any construction project and since alternative sources * * * are nonexistent" (J.A. 9988), "[t]he prospective client is thus forced to make his selection without all relevant market information" (J.A. 9941).

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[34] Petitioner's statement that competitive bidding requires the engineer to submit his price proposal "before, not after he has consulted with the client" (Pet. Br. 19, 20) is incorrect. Price cannot be estimated apart from an accompanying initial service proposal. Initial study and consultation are usually necessary for non-routine tasks. NSPE's Rule 50 for many years provided that the engineer ~~to submit his price proposal "before, not after, he has con-~~ complish (J.A. 7182). Section 11(c), however, bars the engineer from submitting price information to a client before he is selected, no matter how technically sophisticated the client and no matter how much opportunity the engineer has been given to consult with the client and study the project. Thus, when the Department of Defense conducted its limited "two envelope" experiment in competitive bidding, NSPE endorsed the submission of the envelope which contained the engineer's technical proposal for the job. It objected only to submission of the second envelope—the envelope for the price proposal (FP. 46, 50, J.A. 9957, 9959). NSPE recommended that its members merely enclose a fee schedule in the second envelope (FP. 50, J.A. 9959). Similarly, NSPE's Rule 50 for many years stated that the engineer "should set forth in detail the work he proposes to accomplish" and could quote a fee before being retained (J.A. 7182).

should set forth in detail the work he proposes to ac-

For, as the district court noted, "[w]ithout the ability to utilize and compare prices in selecting engineering services, the consumer is prevented from making an informed, intelligent choice" (J.A. 9988).

Although a client may, prior to entering into a contract, terminate its relation with the selected firm, it must completely sever those relations before approaching another firm. See Professional Policy 10–F (J.A. 5767, 9930). Thus, the client—event a client as knowledgeable and important as the Department of Defense (FP. 46–51, J.A. 9957–9959)—is never able to choose among different firms on the basis of the total price-service package of those firms.

Section 11(c) also cripples the ability of engineers themselves to compete on the basis of price. For the ban increases "the difficulty of discovering the lowest-cost seller of acceptable ability. As a result, to this extent [engineers] are isolated from competition, and the incentive to price competitively is reduced." *Bates* v. *State Bar of Arizona,* No. 76–316, decided June 27, 1977, slip op. 25[35]; *Kiefer-Stewart Co.*

[35] Although *Bates* dealt with attorneys, its analysis of the competitive impact of restraints on the marketing of professional services applies with equal force to the engineering profession. That analysis, not based on the antitrust laws, was for the purpose of demonstrating that commercial information about the price and availability of professional services was of sufficient social value to warrant constitutional protection, Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748.

NSPE contends (Pet. Br. 57, 72–75), however that the *per se* doctrine is inapplicable to its total ban on price competition for reasons analogous to another aspect of *Bates* v. *State Bar of Arizona, supra*: The Court's holding that the validity, under the First Amendment, of a state-imposed ban on advertising by attorneys should be tested "as applied" rather than under the "overbreadth" doctrine (slip op. 28–29). This aspect of the decision turns on the Court's conclusion that state regulation of advertising by lawyers is unlikely to chill that form of commercial speech (*ibid*). It thus represented a balancing of considerations of federalism: the states' regulatory power and the dangers of suppressing protected speech. The rule that price-fixing, and the wholesale suppression of price competition, is illegal *per se* rests upon wholly different considerations of economic policy Congress has made applicable to interstate commerce. See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, No. 76–15, decided June 23, 1977, slip op. 15, n. 18.

[36] See note 35, *supra.*

v. *Joseph E. Seagram & Sons, Inc., supra,* 340 U.S, at 213. Moreover, by suppressing price-competition the ban puts a premium on an engineer's experience and reputation, and thereby "serves to perpetuate the market position of established [engineers]." *Bates, supra,* slip op. 26.[36]

B. NSPE'S BAN ON PRICE COMPETITION IS NOT JUSTIFIED BY THE NATURE OF ENGINEERING SERVICES OR THE CLAIM THAT PRICE COMPETITION WILL RESULT IN UNSAFELY ENGINEERED STRUCTURES

NSPE makes a number of arguments allegedly showing that its prohibition of price-competition in the marketing of engineering services is justified. The contention seems to be double barreled. First, the justifications are offered to show that NSPE's ban on price competition should be tested under the rule of reason and not condemned as *per se* illegal. Second, the argument is that under the rule of reason, the restraints are reasonable and legal.

NSPE urges that the character of engineering services makes price competition in their marketing impractical, and that such competition is likely to lead to inferior services, with the consequent danger to public safety that improperly engineered structures will be built. We discuss these arguments below, and show that they do not withstand analysis and are not supported in the record. First, however, we place these contentions in perspective.

NSPE's contention rests on the assumption that it is desirable that engineering clients not be able to consider price in selecting an engineer, and that consumers of engineering services will be best served if "they are not permitted to know who is charging what" (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 770). This contention has no more validity under the Sherman Act, which is particularly concerned with the protection of price competition, than it had under the First Amendment. *Virginia State Board of Pharmacy, supra.*

If an exemption from the Sherman Act's prohibition of price fixing is to be created for the marketing of engineering services, it is for Congress, not for the courts, to do so. *United States* v. *Trenton Potteries, supra,* 273 U.S. at 397–398; *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. at 225–227.

Indeed, Congress has exempted from the Sherman Act restrictive activities in certain industries. See,

e.g., the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291–292 (agricultural cooperatives); the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. 1011–1013 (insurance); the Reed-Bulwinkle Act, 62 Stat. 472, 49 U.S.C. 5b (rail and motor carrier rate-fixing bureaus); Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.* (newspaper joint operating agreements).

NSPE cites the following statement by this Court in *Goldfarb* v. *Virginia State Bar, supra,* 421 U.S. at 788, n. 17, made in connection with its ruling that there is no exemption from the Sherman Act for the learned professions:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

There is nothing in either this statement or in the remainder of the *Goldfarb* opinion indicating, or even

suggesting, that a total ban on price competition imposed by members of a learned profession is not to be condemned under the *per se* rule.[37] Indeed, the holding in *Goldfarb* itself refutes that claim. *Goldfarb* involved minimum fee schedules for lawyers, which the Court condemned as a "classic illustration of price fixing" (421 U.S. at 783).

The defendants in *Goldfarb* made a similar argument to that NSPE makes here. They urged that the legality of their price fixing should be determined under the rule of reason because the case involved a novel application of Section 1 of the Sherman Act to professional services, and that under that rule their restraints were reasonable because permitting price competition would result in lawyers cutting costs and rendering cheap and shoddy service[38] (cf. Pet. Br. 49–50, 57). This Court did not accept this argument. Recognizing that legal services have a "business aspect" (421 U.S. at 788), the Court found it unnecessary to pursue its antitrust inquiry beyond the deter-

[37] NSPE errs in contending (Br. 91–94) that the courts below treated as "meaningless" this Court's vacation of the district court's first judgment, and remand for reconsideration in the light of *Goldfarb*. *National Society of Professional Engineers* v. *United States* (422 U.S. 1031). As shown by the district court's opinion on remand (404 F. Supp. 457; J.A. 9985), and the court of appeals' ruling on this contention (Pet. App. A–8), the district court "engage[d] in a detailed study" on this issue, which was "a sound discernment of *Goldfarb* and its radiations" (*ibid.*) (see Statement, *supra*, pp. 27–30).

[38] *Goldfarb* v. *Virginia State Bar*, *supra*, Brief for Respondent Fairfax County Bar Association, pp. 34, 53–55; Brief on Behalf of Respondent Virginia State Bar, p. 16.

mination that the defendants' activities constituted price fixing.[39]

NSPE seeks to support its position by reference to the Brooks Act, 86 Stat. 1278, 40 U.S.C. (Supp. II) 541–544, in which Congress in 1972 provided that the government should procure certain engineering services by direct negotiation rather than through competitive bidding. But the fact that the legislature has decided that the government should not acquire engineering services through competitive bidding is a far cry from sanctioning concerted action by a private group which deprives customers (including the government) of the freedom to make that choice for

[39] Footnote 17 of *Goldfarb* leaves open for future determination the extent to which, apart from price-fixing, particular professions may collectively adopt and enforce ethical standards aimed at assuring high professional standards of public service, and at preventing overreaching or breach of confidence. Such rules may be valid under the Sherman Act, if no more restrictive than necessary, even though collective restraints enforced by non-professional groups may be unlawful. Compare *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U.S. 457. But since, as the court of appeals correctly held, this case involved a total suppression of price competition, not a rule "narrowly confined to [the] interdiction of abuses" (Pet. App. A–12), it was unnecessary to consider this question. NSPE elaborately argues that even restraints affecting price may in certain contexts be judged under the rule of reason (Pet. Br. 41–51). Examination of the cases on which it relies (*e.g.*, *Chicago Board of Trade* v. *United States*, 245 U.S. 231; *Maple Flooring Manufacturers Assn.* v. *United States*, 168 U.S. 563), however, shows that the alleged restrictions in those cases only peripherally affected price, and that they in fact enhanced competition by assuring equal access to information necessary to rational decision making. NSPE's Rule 11(c), on its face and as applied, interferes with rational economic choice by preventing any possibility of price comparsion.

themselves. There is an enormous difference between customer choice and sellers' imposition.

Congress recognized this distinction in enacting the Brooks Act. The legislative history states that the Act would not "limit the operations of the Department of Justice in the application of our antitrust laws" (H.R. Rep. No. 92–1188, 92d Cong., 2d Sess. 6 (1972)). The Brooks Act does not indicate that Congress intended to exempt price fixing by professional engineers in the marketing of their services from *per se* illegality.

We now turn to the particular justifications NSPE offers for its ban on competitive bidding.

1. Price Competition for Engineering Services is Feasible and Practical

Engineering services are not so unique or incapable of advance evaluation as to make price quotations prior to selection of the engineer to do the work inherently misleading. To the contrary, prices quoted in response to a request for a bid on engineering services necessarily must be based on a focused assessment of the specific task. Moreover, purchasers of engineering services, particularly governmental and industrial entities, are likely to be highly sophisticated in the technical aspects of their engineering requirements, and well able to determine the reliability of price estimates in the light of the engineer's qualifications. In addition, as the court of appeals noted, "the professional who responds to a request for a bid has a better grasp of the specific task before him and a better opportunity to take into account the sophistication of the potential purchaser" (Pet. App. A–9 n. 4).

NSPE's own practice shows that price competition in the rendering of engineering services is both feasible and practical. Engineering services cover a wide spectrum. Some services are so repetitive that the engineer actually uses "the same design as had been used in a previous project" (FP. 41, J.A. 9955). Others are sufficiently standardized that they are incorporated into recommended fee schedules of state engineering societies, to which NSPE's Rule 11(c) expressly refers and which are enforced as "ethical" minimum fees (FP. 39–41, J.A. 9955). Cf. *Bates* v. *Arizona, supra,* slip op. 21. As NSPE officials have recognized with respect to conventional engineering services, "[n]ormally there have been significant numbers of other similar projects so that the required scope of effort, approach and necessary steps are generally known" (J.A. 5739; see Statement, *supra,* p. 15, 16). The least standardized service, for which costs are most difficult to predict (see Statement, *supra,* pp. 12–14), involves pioneering research and development.

With respect to both highly standardized and highly unusual services, NSPE permits disclosure of price information to potential clients prior to selection of an engineer. In the former situation, it is done by "[t]he disclosure of recommended fee schedules prepared by various engineering societies" (Rule 11(b), *supra,* p. 4). In the latter situation, at least since 1972, NSPE has permitted price competition for research and development contracts (see Statement, *supra,* p. 12–14.). Of course, the recommended fee

schedules, as the district court found, confine the client to a "fixed range of uniform prices" and thus restrict meaningful price comparison (J.A. 9941). When, in 1972, NSPE opened R & D contracts to price competition, it did so because only through competitive bidding could engineering firms obtain this lucrative business in the face of competition from other types of enterprise willing to bid (see Statement, *supra,* p. 12–14).

The fee schedules and the "ethical" classification of competition for research and development contracts show that engineering services are not so universally unique as to render price comparison unworkable.

2. Price Competition in the Offering of Engineering Services Will Not Endanger Public Safety

NSPE claims that price competition would force engineers to make unreasonably low bids, to cut corners, and thus to endanger the safety of the public. The work of an engineer, it asserts, "affects a population—and usually a large population—rather than an individual" and therefore "the consequences of error * * * are generally greater than in medicine or law" (Pet. Br. 7).

Curiously, however, NSPE now argues that there is little risk of this kind associated with research and development contracts (Pet. Br. 16), although prior to 1972, it applied its ban against disclosing price information to such work. Similarly, safety apparently was not a problem under former Rule 50 of NSPE's Rules of Professional Conduct, which for many years provided that an engineer could ethically inform a client of the cost of services he proposed to provide,

although the NSPE discouraged the giving of such information (see J.A. 7182). Moreover, despite the claimed concern for safety, for two years between 1966 and 1968, NSPE's "When-in-Rome" clause expressly allowed fee bidding in foreign countries (J.A. 6487).[40] Nor does NSPE seem concerned for safety in recommending state fee schedules.[41]

In any event, this justification is unsound for a number of other reasons. The claim proves too much,

[40] The "When-in-Rome" clause was revoked because many members did not need it to secure overseas business, and because it was an obvious embarrassment domestically. As the PEPP Section Committee stated: "How can we explain satisfactorily to GAO [General Accounting Office] why OK to bid on overseas work and not on domestic work?" (J.A. 9890).

[41] The fee schedules to which NSPE has required that its members adhere, generally are based on a percentage of the construction cost of a project (*e.g.*, J.A. 7952–7955, 8114, 8235–8239, 8361–8365).

NSPE's own executive director testified that with this method "* * * you get the same price, whether you do good or poor engineering. Therefore, the less engineering you can do, perhaps the more profit you make, providing, of course, you make a satisfactory, adequate building" (J.A. 1793–1794).

His testimony also undermines NSPE's claim that fee competition will "increase * * * construction, maintenance, operating and life-cycle costs" (Pet. Br. 31). When an engineer computes his fee as a percentage of construction cost, "[t]here is also almost no incentive to work on the life cycle [costs] business because it [the fee] is entirely in terms of the construction at the end of the project itself" (J.A. 1794).

Although NSPE now asserts that it "recommends against use of the percentage of construction cost method" (Pet. Br. 14), its Guide For Professional Engineers' Services, first issued in 1969 and now in use (J.A. 6522), fully describes the circumstances where "[t]his method is applicable." It cautions that "fee schedules or curves applicable to the region in which project is to be constructed should be used when this method of compensation is adopted" (J.A. 5488).

since it would justify the elimination of price competition in large segments of our economy. The fact that engineers deal intimately with matters of public safety hardly distinguishes them from numerous other businesses and professions whose work is also essential to public safety. Most work by construction contractors, for example, involves public safety. Under NSPE's public safety theory, general building contractors, as well as plumbing, electrical, masonry, welding, and other construction sub-contractors, could all agree to eliminate price competition for their services. The theory would also seem to cover the suppliers of commodities that affect public safety and health, such as the manufacturers and dispensers of drugs and cosmetics.

Further, the argument assumes that engineers will sacrifice public safety for personal profit. The professional traditions of engineering, which make safety a primary responsibility are themselves a principal safeguard against such conduct.[42] Under a system of price competition, engineers, no less than lawyers, can be expected to uphold the integrity and honor of their profession, and to conduct themselves with candor and

[42] NSPE has long had several Code provisions aimed at preventing unsafe engineering and deceptive fee proposals. Its Code provides (Pet. App. A–50—A–59):

"Section 1—The Engineer * * * a. * * * will be realistic and honest in all estimates, reports, statements, and testimony.

* * * * *

"c. He will advise his client or employer when he believes a project will not be successful.

* * * * *

"Section 2—The Engineer will have proper regard for the

honesty in estimating the price of their services for particular tasks in seeking to be selected. Cf. *Bates*, *supra*, slip op. 27; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 748.[43]

safety, health, and welfare of the public in the performance of his professional duties * * *. He will notify the proper authority of any observed conditions which endanger public safety and health.

"a. He will regard his duty to the public welfare as paramount.

"b. He shall * * * work for the advancement of the safety, health and well-being of his community.

"c. He will not complete, sign, or seal plans and/or specifications that are not of a design safe to the public health and welfare and in conformity with accepted engineering standards. If the client or employer insists on such unprofessional conduct, he shall notify the proper authorities and withdraw from further service on the project.

* * * * *

"Section 6—The Engineer will undertake engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service.

* * * * *

"Section 13— * * *

"a. He will conform with registration laws in his practice of engineering."

[43] Competitive bidding by lawyers is no longer unethical under the ABA Canons of Ethics. See American Bar Association, *Committee on Professional Ethics*, Formal Opinion 329 (August, 1972), overruling a prior opinion (No. 292, October 15, 1957) that had characterized any response to an invitation to bid on a legal services contract as unethical solicitation. Engineers can ethically publicize, through brochures and other factual representations, their "experience, facilities, personnel and capacity to render service" (Pet. App. A–52; examples of these promotional brochures are reproduced at J.A. 8849–8949, 9079–9889). Cf. *Bates*, *supra*, slip op. 14, 17, (majority opinion), 8 (Powell, J., dissenting).

High professional standards in engineering, moreover, are enforced by state regulation (FP. 6, J.A. 9945, 9966), and engineers who endanger public safety risk loss of their licenses. Cf. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 768."

Structures must also meet the safety requirements of local building codes.[45] Engineers and contractors who are responsible for unsafe structures risk sub-

[44] Every state has laws which provide for the licensing and registration of engineers, and all engineers who offer their services to the public must be registered (FP. 6, J.A. 9945, FD. 3, J.A. 9964). Although the provisions of these laws vary from state to state, they usually require an individual to be a graduate engineer, to have at least four years of experience, and to pass a written examination in order to be certified (FP. 6, J.A. 9945). State registration laws also often require that licensed engineers practice only in those specialty areas where they are qualified and competent, and practice in other areas may subject an engineer to sanctions that can include loss of license (FP. 7, J.A. 9945–9946). Licensing and registration boards throughout the United States have the authority to discipline registered professional engineers, and the laws of most states provide that professional misconduct is a basis for suspending or revoking a professional engineer's license (FD. 3, 39, J.A. 9964, 9969).

[45] Various municipal construction codes and other codes relating specifically to plumbing, electricity, fire prevention, and similar topics, govern the performance of architects, engineers, electricians, plumbers, and others involved in designing and constructing buildings of various types. See, *e.g.*, Administrative Code of the City of New York, ch. 26, Title C (1968); District of Columbia Rules and Regulations, Title 5A–1 (1972, as amended to 1977). States, too, have begun to adopt their own construction codes, not only to permit efficient and economical construction techniques, but also to promote uniform standards for protection of the public health and safety. See, *e.g.*, New Jersey Stat. Ann. § 52:27D–119, *et seq.* (1976); also, Virginia Code Ann. § 36–97 *et seq.* (1977 Supp.).

stantial legal liability both in tort and under local construction codes if the structure collapses or causes injury. That risk itself provides a substantial incentive for both client and engineer to assure themselves that safety is engineered into any project.

Since the award of engineering contracts significantly involves the client's confidence and trust (FD. 49, J.A. 9970), an engineer who does shoddy, unsafe work—like an engineer who deceives the client about price—also risks loss of his reputation, even if he does not lose his license.

Although NSPE conjures up the specter of collapsing bridges and falling buildings where price competition is involved (Pet. Br. 28–29), there is no evidence in this record that competitive bidding or price comparison was a factor in the accidents to which it refers (J.A. 1028–1053; see also J.A. 1862–1864, 2010–2011, 2014–2015, 2085–2087, 1317–1318, 516–519, 838–839, 261–266).

NSPE is simply arguing, on the basis of self-serving speculation,[46] that price competition is so universally likely to endanger public safety, that it may be eliminated by the private collective decision of those most likely to profit thereby. But the courts below, after carefully examining the nature and operation of

[46] NSPE has been constantly mindful of the economic interests of engineers in prohibiting price competition. It has advised its members that adherence to the ban on competitive bidding will protect higher engineering fees (FP. 35, J.A. 9953) and has cautioned that in the long run, an engineer "reduces his own fee capability by bidding" (J.A. 6300).

Rule 11(*c*), found it to be nothing more than "a rule that is sought to be justified in terms of avoiding dangers to society, but which has been both written and applied in practice as an absolute ban (affecting prices) that governs situations where there are no such dangers" (Pet. App. A–12). The record fully supports that conclusion.[47]

II. THE JUDGMENT DOES NOT VIOLATE NSPE'S FIRST AMENDMENT RIGHTS

NSPE claims that portions of the judgment summarized above (Statement, *supra*, p. 26)—which bar it from continuing to maintain and enforce an official policy that prevents engineers from engaging in price competition—violate its First Amendment rights (Pet. Br. 77–91). It did not make this argument to the district court initially [48] or during the proceedings on remand.

[47] As the court of appeals pointed out, however, "[i]f the Society wishes to adopt some other ethical guidelines [than Section 11(c)] more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree" (Pet. App. A–10). See also note 39 *supra*, p. 47, note 50, *infra*, pp. 57–58.

[48] We dispute NSPE's claim (Br. 77) that it was improperly denied a hearing. When in late 1974 the district court first ruled for the government, it invited the United States, as prevailing party, to submit a proposed judgment. The government did so. At the urging of NSPE's counsel, attorneys for each side met with District Judge Smith at his home on New Year's Eve to discuss the judgment. No transcript was made. Government counsel was agreeable to holding a hearing on any disputed terms of the judgment, but NSPE's counsel opposed this because such a hearing would have delayed the entry of judgment until after the expiration of the provision of the Expediting Act, which allowed direct appeals to this Court. NSPE counsel insisted that judgment be entered immediately, and the court complied with his request.

After remand from this Court, the district court held a hearing on November 7, 1975. At this hearing, counsel for NSPE stated in passing that he wanted a "hearing on the form and content of the decree" (Tr. 51). Neither the government nor the district court had any objection to such a hearing, but petitioner never followed up the matter, either in the ensuing three weeks leading to the entry of judgment, or thereafter.

[49] Although NSPE claims that it has not enforced Section 11(c) (Pet. Br. 85), the district court found otherwise (FP. 56–69, J.A. 9964; J.A. 9940). As the court of appeals concluded (Pet. App. A–5, A–9—A–10), this finding is not clearly erroneous. See pp. 17–22, *supra*.

[50] NSPE misreads the court of appeals decision insofar as it contends (Br. 94–97) that it is being subjected to a broad injunc-

The decree—as modified by the court of appeals (Statement, *supra*, p. 31)—provides a remedy tailored to the district court's findings that NSPE's Rule 11(c) is an illegal agreement restraining price competition (J.A. 9943, 9972, 9974, 9990), and that NSPE secured adherence to its terms by extensive publicity and by enforcement activities. Those activities were neither political nor commercial speech. NSPE was not simply expressing its views concerning the desirability of price competition in an attempt to persuade its members independently to decide to refrain from price competition. Rather NSPE promulgated and enforced [49] an "ethical" rule which coerced its members to avoid price competition.

Its program was thus, in the court of appeals' words, "one of all-out interdiction of price information" (Pet. App. A–10).[50] As this Court has held:

> * * * [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. * * * Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. [*Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502.]

Although petitioner broadly complains of interference with its right to speak, the judgment does no more than is necessary to prevent a recurrence of petitioner's numerous and widespread activities in publicizing and enforcing its total ban on price competition because it exercised its right to contest the government's complaint. The court of appeals simply held that NSPE's belated offer, at argument, to "work out a more refined decree" (Pet. App. A–10) did not invalidate the relief ordered by the district court. First, as the court noted, no such initiative had been made in the district court (*ibid.*). Second, NSPE's unyielding position throughout this litigation is that it may suppress price competition under "the principle embodied in Section 11(c)," however it is formulated (Pet. Br. 75). Since, on the record as it stood, NSPE implemented this "principle" by "an all-out interdiction of price information" the court of appeals held that "this warrants a firm remedial decree" (Pet. App. A–10).

NSPE remains free, of course, to devise narrower ethical rules that comply with the antitrust laws.

petition by engineers.[51] *United States* v. *Gypsum Co.*, 340 U.S. 76, 89. Such relief is consistent with decisions of this Court holding that a judgment in an antitrust case may restrain such activities in order to prevent repetition of Sherman Act violations. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514; *United States* v. *Otter Tail Power Co.*, 360 F. Supp. 451 (D. Minn.), affirmed *per curiam*, 417 U.S. 901.[52]

Petitioner's narrower argument that the judgment "runs directly contrary to the *Noerr-Pennington* doctrine" (Pet Br. 83), is also without merit, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, established that the antitrust laws do not prohibit efforts to persuade governmental bodies to adopt anticompetitive policies. NSPE's violation of the antitrust laws, as

[51] NSPE inaccurately describes (Pet. Br. 79–80) the breadth of the judgment. The decree restrains the Society from official communications designed to produce or resulting in the illegal concerted business practices formerly done. Thus, ¶ VII of the judgment bars the dissemination only of a Code, rule, or guideline which prohibits or discourages the submission of price quotations (Pet. App. A–17). Similarly, although NSPE claims that all its members, as individuals, are swept up by the decree (Pet. Br. 77–78), the relevant definitional provision, ¶ III, makes it clear that the judgment applies only to persons other than NSPE when they are "in active concert or participation with the defendant * * *" (Pet. App. A–15—A–16).

[52] See also: *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–618; *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 226; *Zacchini* v. *Scripps-Howard Broadcasting Co.*, No. 76–577, decided June 28, 1977.

found by the district court, did not rest upon such efforts.[53] Nothing in the judgment prevents NSPE and its members from attempting to influence governmental action,[54] or from communicating their views to state or federal officials.[55]

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[53] NSPE argues at length (Pet. Br. 83–85 n. 253) that its successful boycott of the Department of Defense "two envelope" experiment was "privileged conduct under the *Noerr-Pennington* doctrine" (*id.* at 85 n. 253). The argument misses the mark. The district court did not hold that NSPE's lobbying efforts were not constitutionally protected or were the basis of antitrust liability. What it did find, however, was that NSPE and its allies had gone beyond activity protected under the *Noerr-Pennington* doctrine and had engaged in economic coercion to frustrate the government effort to obtain price competition (FP. 46–51. J.A. 9957–9959). These findings, as the court of appeals held (Pet. App. A–10), are correct.

[54] Indeed. the only mention in the judgment of government officials is in Paragraph VIII's requirement that NSPE send copies of the judgment to each State Board of Engineering Registration in the United States (Pet. App. A–17).

[55] NSPE's claim that Paragraph IX unconstitutionally infringes its associational rights (Pet. Br. 88–90) is groundless. Paragraph IX simply bars NSPE from granting affiliation to a state or local society that "prohibit[s], discourage[s] or limit[s] [its] members from submitting price quotations for engineering services at such times and in such amounts as they may choose [or which otherwise] participate[s] in or * * * [adopts] any plan, program or course of action which has the purpose or effect of suppressing or eliminating competition among [its] members based upon engineering fees" (Pet. App. A–18 – A–19). Since the district court found that NSPE has worked in conjunction with its state and local affiliates both in propagating fee schedules and in enforcing the ban on competitive bidding. this provision is reasonable as a method of preventing recurrence of those pactices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1767

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government brief ("G. Br.") does not respond to petitioner's brief ("NSPE Br."), is pervasively erroneous, and does not withstand scrutiny. It misstates the main facts, employs fallacious logic, and ignores controlling law. Limitations of time and space prevent discussion of all the errors, fallacies and omissions in the government brief. The most significant ones are analyzed in the following sections.

I. THE GOVERNMENT BRIEF PROVES THAT THE RULE OF REASON APPLIES TO THIS CASE.

The government brief itself is a conclusive demonstration that this case cannot be decided under the procrustean *per se* rule, and must be decided under the rule of reason. As shown herein, many of the major premises and assertions in the government brief are flatly wrong, inaccurate or misleading. However, if every assertion and allegation in the government brief were accepted as correct, the government brief would simply prove that this case must be decided under the rule of reason. The government brief discusses the nature of engineering, the history of the ethical principle, its scope and operation, its economic purpose and competitive impact, and its justification. On each of these points the government brief states a different position than that stated in NSPE's brief. But if these matters are at all relevant, and warrant the Court's consideration, then the case is clearly a rule of reason case. As the Court has plainly stated, these are the elements to be considered on the evidence under the rule of reason, *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238-41 (1918); *White Motor Co.* v. *United States*, 372 U.S. 253, 261 (1963); and not subject to consideration under the *per se* rule. *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958); see also NSPE Br. 45-60. These are also the elements the courts below expressly refused to consider and held irrelevant, and on which the district court made no findings. If this is a *per se* case all of these matters are irrelevant.

Thus, in seeking to meet NSPE's case, the government brief implicitly concedes that its basic premise is wrong. This case cannot be decided by the simple expedient of *per se*, but requires determination on the evidence under the rule of reason.

II. THE GOVERNMENT BRIEF IS INCONSISTENT WITH THE DECISIONS OF THE LOWER COURTS, AND REQUIRES REVERSAL.

Although the government brief repetitively invokes the pejorative term "price fixing"—which the record shows is not involved here, as demonstrated below—the argument which the government brief offers to sustain the judgment relies on other considerations the lower courts expressly rejected. Taking its own summary of argument, the government brief's two major points are that the NSPE principle is not justified by the nature of engineering (G. Br. 32); and that fee bidding for engineering design work is feasible and practical (G. Br. 33). The argument then proceeds to assert that: "Price competition in the offering of engineering services will not endanger the public safety. . . . There are many safeguards other than the suppression of price competition to assure high quality engineering work. . . . Moreover, there is no objective evidence that competitive bidding or price comparison by engineering clients leads to unsafely engineered structures." G. Br. 34.

The fatal defects in this argument are that, in addition to being disproved by voluminous evidence, it is directly contrary to the position taken by the lower courts, at the government's urging, and lacks any support whatever in the district court findings. See III, *infra*. Contrary to the government brief, the question before this Court is *not* whether the lower courts erred in weighing the evidence of reasonableness. The question before this Court is whether the lower courts erred in expressly refusing to weigh that evidence. This point is proved by the lower court opinions themselves.

In its first opinion the district court said: "It is undisputed that price fixing is a *per se* unreasonable restraint of trade under the Sherman Act and that in such

cases *it is not for the court to decide whether a particular price fixing activity serves an honorable or worthy end.*" 389 F. Supp. 1199, J.A. 9938. "[T]he court is convinced that the ethical prohibition against competitive bidding is *on its face* a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. . . . The Sec. 11(c) ban on competitive bidding is in every respect a classic example of price-fixing in violation of § 1 of the Sherman Act." 389 F. Supp. 1200, J.A. 9940-41. (Emphasis added.)

In its second opinion the district court said: "Price fixing is a *per se* violation of the Sherman Act, *requiring no further inquiry into the activities' origin, history or purpose.* . . [T]he Court adheres to its previous decision holding Section 11(c) of defendant's Code of Ethics to be a *per se* violation of § 1 of the Sherman Act." 404 F. Supp. 460-61, J.A. 9988-90. (Emphasis added.)

The circuit court affirmed the conclusion of the district court on this point, saying: "The district court correctly appraised the rule before it as one that at its core 'tampered with the price structure', and as therefore *illegal without regard to claimed or possible benefits.*" 555 F.2d 984, Cert. App. A-12. (Emphasis added.)

The government's own brief in the district court on remand stated that the district court "correctly refused" to consider whether the ethical canon "serves an honorable or worthy end." See NSPE Br. 59-60.

Thus, the government, having successfully urged the lower courts to decide the case on a *per se* basis—without considering the evidence relating to reasonableness or making any findings relating to reasonableness—now urges this Court to affirm on the basis of *a priori* argument that the ethical principle is unworthy and unreasonable. Having argued and secured decisions that justification is irrelevant, the government now seeks to sustain these decisions on the basis that the ethical principle is not justified.

In sum, the decisions below do not support the government argument here; and the government argument here does not support the decisions below. This is precisely the situation presented in *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), where the lower court judgment was reversed, and in *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). *Fortner* was an antitrust case in which the plaintiff prevailed in the district court on a theory of *per se* violation. The findings and judgment were affirmed by the court of appeals. On review this Court held that the *per se* rule did not apply, and therefore that the judgment must be reversed. The same result is required here.

III. THE GOVERNMENT BRIEF IS PERVASIVELY INACCURATE AND MISLEADING IN ITS FACTUAL PREMISES.

A. The District Court Made No Independent Findings of Fact.

The government brief asserts, at 5, that the facts "are set forth in the District Court's initial findings, 69 of which were adopted with modifications from those proposed by the government . . . and 56 from those proposed by NSPE. . . ." The government brief then sets forth a statement of alleged "facts" based on the so-called "findings" of the District Court. In fact, however, the District Court made no independent findings, did not scrutinize the findings it adopted wholesale from the government proposals, adopted only those findings proposed by NSPE of which government counsel ap-

proved,[1] did not refer to any of the testimony of any of the numerous witnesses in this case, did not analyze or even mention most of the record, did not change a single word or punctuation mark in the judgment presented to it by the government attorneys, and, in short, essentially abdicated the adjudicatory function to the government attorneys. Even the district court opinions were virtual redactions of the government's briefs.

Of the 69 proposed government findings adopted by the district court, 61 were adopted verbatim, seven were altered only by changing a few words to provide grammatical continuity, and only one was changed in a manner which could be termed substantive—and that one change merely involved omitting one entirely conclusory sentence. Thus, the assertions in the government brief supported only by reference to purported "findings" actually rest only on contentions of government attorneys which were not independently reviewed.

This Court and other appellate courts have strongly criticized, as an abdication of the judicial function, the verbatim adoption by trial courts of findings proposed by a party. That procedure is an inadequate substitute for judicial review. See authorities cited in NSPE Br. 59 n.210.

B. The History Of The Ethical Principle Against Bidding Is Substantially Misrepresented In The Government Brief.

The government brief discusses the origin, history and development of the ethical principle in a manner that suggests it was a device to serve the engineers' economic interests, and had no relation to the public interest. This misrepresentation rests on selected statements of individuals, culled by the government from tens of thousands of documents secured from numerous sources, and on the government's unwillingness to state to this Court NSPE's position as set forth in NSPE's authorized publications.

[1] The District Court knew which of NSPE's proposed findings the government approved because it required each party to mark the other's proposed findings in blue, red, and yellow, signifying agreement, disagreement and irrelevance. See J.A. 2406-07.

The government brief begins its discussion of the ethical principle's origin by asserting that the principle derives from NSPE's "Canons of Ethics." The government brief then asserts, at 8, that it is feasible for an engineer before being initially selected to inform his client of the cost of the proposed services. No citation is given for the latter assertion. Both are contrary to the record.

Contrary to the government brief, the ethical principle at issue long antedates the formation of NSPE, and grew out of statements of ethics by many engineering organizations dating back at least to 1911. See NSPE Br. 22. The "Canons of Ethics" to which the government refers were not those of NSPE but of the Engineers' Council for Professional Development ("ECPD"), and were endorsed by NSPE prior to the time NSPE adopted its Code of Ethics in July 1964. J.A. 2534. It is the NSPE Code of Ethics which is attacked in the complaint, not ECPD's long-superseded Canons.

The government brief's assertion that it is generally possible for an engineer to state the cost of his service before consulting with the client is flatly wrong, and is contradicted by extensive testimony in the record. For example, Dr. Marlowe, Vice President of Catholic University, former Engineering School Dean, and former head of the District of Columbia Board of Registration for Professional Engineers (see J.A. 1958-69) testified that "after a part of the engineering work has been done, a little in simple cases and a lot in complex cases, then you are in a position to know what the price of a job is going to be—but not at the beginning. Not at the beginning." (J.A. 2006) James Shivler, head of a large

engineering firm (J.A. 657-79) was asked how long it takes to determine his firm's fee for a job. He testified: "I would say an average complex job of average complexity would probably take us about two weeks, including the initial meeting with the client, and then we would come back and work out our costs." (J.A. 804) Other eminent engineers testified to the same effect. Pikarsky, J.A. 58; Lawler, J.A. 375-78; Gibbs, J.A. 1280. There is no contrary evidence; the assertion in the government brief is without any support and false. There is no finding to the contrary.

The government brief implies that "Rule 50" supports the contention that an engineer can specify costs in advance of engagement and consultation with a client. "Rule 50" was apparently adopted in 1957 (J.A. 7176), and superseded in 1964, and represented part of an interpretation of the ECPD ethical canon stating that an engineer will not compete with another engineer "by underbidding." J.A. 7182. "Rule 50" stated that it was ethical for an engineer to solicit an engineering assignment by providing factual information concerning his qualifications, and that if he were asked for a proposal for a specific project he should state in detail the work he proposed to do. It also said that a statement of fees should be avoided at that point. J.A. 7182. Together with "Rule 51" which follows it immediately, "Rule 50" is clearly directed toward avoiding the evil of deceptively low fee estimates or bids which might mislead clients at an early stage. A fair reading of "Rule 50" is that when a client asks an engineer for a specific proposal the client and engineer will consult, and the engineer will secure the necessary information from the client to enable the engineer to formulate a rational concept of the project. Nothing in "Rule 50" or its context or this record suggests any other interpretation.

The government brief wrongly states, at 9, that "Rule 50" was changed in 1961 to "narrow the circumstances

in which an engineer could ethically inform a prospective client of his charges." In fact, the very document cited in the government brief plainly indicates that the former version of "Rule 50", if interpreted to permit quoting fees before the facts were known, would be inconsistent with the ethical principle (J.A. 6380); and sets forth amendments to "Rule 50" which explicitly provide that engineering firms should be initially selected on the basis of qualifications, and that *after* an initial selection has been made there should be negotiations on the project's scope and the fee. J.A. 6383. This is the precise procedure mandated by numerous United States statutes and regulations including the Brooks Act, and embodied in section 11(c) of NSPE's Code of Ethics. *See* NSPE Br. 24-27, 61-65.

The government brief states, at 10 n.10, that the NSPE Board of Ethical Review ("BER") rendered an opinion on "Rule 50" after the Rule was amended. In fact, the sequence was to the contrary. The BER opinion was issued in 1960, as its number, 60-2, indicates. J.A. 2564. The report amending "Rule 50" is dated February 9-11, 1961, and refers to BER opinion 60-2. J.A. 6379, 6380. The 1960 BER opinion corroborates the interpretation of "Rule 50" stated above. BER opinions are the authoritative statements of NSPE interpretations of ethical principles. See NSPE Br. 23 n.95. BER opinion 60-2, interpreting "Rule 50" states, in relevant part:

> Since the securing of competitive bids for professional engineering services is not in the best public interest and as such procedure frequently results in the awarding of the work to other than the best qualified engineer, the National Society of Professional Engineers does now and herein express itself as opposed to competitive bidding for professional engineering services and recommends the practice of negotiating contracts in all cases where it may be

> necessary or desirable to consider the service of more than one engineering consultant or organization. [J.A. 2564.]

Thus, in 1960 BER said that the traditional method of engineer selection by competence should be followed under "Rule 50": there should be consultation between the engineer and client prior to the statement of a fee.

The government brief proceeds to set forth, at 10, a purported revised canon which stated that an engineer would not engage in "competition on price alone." While the quotation in the government brief is taken from a document in the record, this canon has no significance in this case because it was never approved, adopted or implemented in any way by NSPE, and, indeed, was expressly *disapproved* by NSPE, as the record shows. J.A. 6244-45.

The government brief alleges, at 11, that during the period involved in this case the NSPE ethical principle applied to all work done by professional engineers. This is simply false, as the record makes plain. In 1962 the Board of Ethical Review held R&D work outside the scope of the ethical principle. J.A. 2599. The Board said: "R&D projects are more in the nature of contracts to produce an end-item or prototype rather than of the traditional services concept found in engineering." J.A. 2600. This authoritatively states NSPE's position (see F.D. 27, J.A. 9967), which remains unchanged.

The government brief, however, implies that the 1962 ruling was changed. The government brief, at 11 n.13, refers to a reconsideration of the question by BER in 1971, and quotes from a personal letter which purports to state in a few words the position of one BER member. Whatever individual members may have said to one another, the BER opinion cited states:

> The evil of competitive bidding for engineering services is that it endangers the public health, safety and welfare. When price is a factor in selecting a person or firm to design a bridge, a heating system, a dam or an electrical system and similar physical facilities the great danger is that the client will be tempted, or even required, to select the person or firm offering the lowest price. Long experience demonstrates that this kind of price competition for creative services not subject to comparison or standards is destructive of competence and care. A poor job to meet a low price thereby invariably must lead to shortcuts and careless techniques which present increased risk that the bridge may fall, the heating system explode, the dam collapse or the electrical system start fires. Moreover, inadequate engineering, resulting from competitive bidding, will result in higher life cycle costs and lack of consideration of other related factors. [J.A. 5736]

The foregoing BER statement authoritatively sets forth NSPE's policy and the underlying considerations. On the basis of these considerations, BER tentatively thought that study contracts should not be subject to competitive bidding. However, before this opinion was promulgated, the argument was presented to BER that R&D and study contracts do *not* involve the public interest considerations referred to, but involve instead undertakings to make studies of specified scope, and to design prototypes for testing, not for public use. The BER opinion was thus never issued, J.A. 2778, 5746, 5748-49, and NSPE policy that the principle against selection by fee bidding does not apply to study and R&D contracts remains unchanged. J.A. 1788-90.

The government brief asserts, at 12-13, 49-50, that NSPE revised its interpretation of "the bidding ban" in 1972 to exclude special studies and R&D, and wrongly attributes the revision to an alleged necessity to meet competition for such work. In 1972 NSPE did revise

its policy statement on "Selection Procedures for Professional Engineering Services." J.A. 2445. However, it did *not* do so for the reason stated in the government brief. The revision did not identify R&D work. Rather, it specifically confined the principle against selection by bidding to work involving design of real property structures. J.A. 2445. The change was made because this was the kind of work which involved risks to clients and the public when initial selection by bidding was employed. J.A. 5682-83; see NSPE Br. 17-18.

The sole authority the government brief cites for its contention is a paper the government brief describes, at 13, as the "principal NSPE study" on the subject. In fact, the paper is not a "NSPE study" at all, and was not prepared for NSPE. As the paper shows on its face, it was prepared by a single individual for the Committee on Federal Procurement Procedure of A-E Services (COFPAES). J.A. 5737. Whatever the merits or demerits of this paper may be, it is not attributable to NSPE, does not state NSPE policy or reasoning, and is simply another example of the government brief's highly misleading use of someone else's document swept up by the government in its nationwide discovery in this case, inserted into the record, and now cited regardless of its lack of any attribution or connection to NSPE.

C. NSPE Neither Maintains Fee Schedules Nor Fixes Prices.

Although the complaint in this case makes no reference to fee schedules, and NSPE has no fee schedule, and the District Court held that fee schedules are "not at issue in this case", J.A. 9940, the government brief persists in dragging this red herring before the Court. Since the government first raised the spurious issue of fee schedules on the eve of trial, NSPE has repeatedly offered to delete all references to fee schedules of other professional so-

cieties in any NSPE publication. These are the only fee schedules to which any NSPE publication has referred. The fee schedule-price fixing charge is a spurious issue to distract the Court from the real issue—whether the ethical principle against selection by bidding in engineering does or does not serve the public, and whether it is or is not unreasonable.

Although NSPE still declines to be baited into defending fee schedules, it is important to note that the government brief is thoroughly wrong on this subject, too. The government brief wrongly charges that NSPE enforces fee schedules, saying, at 16, that "[d]eviations from the fees set forth in state or local fee schedules violate" the NSPE Code, and, at 51 n.41, that "NSPE has required that its members adhere" to fee schedules. This charge is irrelevant, misleading and without evidentiary foundation. The misleading nature of this charge can be illustrated simply by examining the citations the government brief supplies. Footnote 41 (G. Br. 51) charges NSPE with requiring adherence to fee schedules, and cites Government Exhibit 409-D, a manual of nearly one hundred pages published not by NSPE, but by the American Society of Civil Engineers as ASCE Manual No. 45. J.A. 8358-8448. Two pages in the Manual show "Median Compensation For Basic Services Expressed As A Percentage of Construction Costs. . . ." J.A. 8386, 8387. "Median" denotes a measure of central tendency which states the midpoint of a range without defining or indicating the range. Therefore, stating a median compensation necessarily implies that this is a statement of historical data and that actual compensation was both above and below the median. Although this point might not be self-evident to lawyers, it is certainly obvious to engineers who are accustomed to mathematics in their daily work. It is absurd to speak of requiring "adherence" to a "median" schedule. This is emphasized by the manual itself which states explicitly:

> While these curves may be an appropriate basis for initiating discussions with a client, the final compensation should be determined by negotiations following detailed discussion of the scope of services and the elements of the cost of engineering. [J.A. 8388.]

Ironically, however, the government brief does not even cite the pages of ASCE Manual 45 which set forth the median fee curves. It cites *inter alia*, J.A. 8364, which states:

> It is to be understood that the data given hereinafter for engineering percentage fees, factors on payrolls, etc., are not to be considered as fixed, or maximum, or minimum, but rather as general guides to be used or not used, in the sole discretion of each individual, to assist in the negotiation of agreements between Clients and Engineers. They provide a sound basis for determining reasonable compensation for engineering services, being composites of the experienced judgment of many engineers.

See also, *e.g.*, state fee schedules at J.A. 7801, 7802, 7975, 7976, 8130, 8166, 8168, 8193-96, 8264, 8265, 7288, 7400, 7573, and 7593. Moreover, as this record shows, ASCE's publication was submitted to the Department of Justice and published with Department of Justice approval. J.A. 2303-05, 8361.

Furthermore, this Court has never held that professionals may not supply advisory fee information to prospective clients. To the contrary, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 781 (1975), the Court stated:

> A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question . . . The record here, however, reveals a situation quite different from what would occur under a purely advisory fee schedule. Here a fixed, rigid price floor arose from respondents' activities: every lawyer who responded

> to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee.

In any event, the "fee schedule" and "price fixing" charge is a red herring which merely provides the opportunity for the government brief to attack the NSPE principle by epithets rather than analysis. The NSPE principle has never required adherence to any fee schedules, and even had that been the case it is not defended in that respect.

This is corroborated by the records of this Court. On February 25, 1975, months before the decision in *Goldfarb* v. *Virginia State Bar*, NSPE filed in this Court its Reply to Motion to Affirm in No. 74-872. In that pleading NSPE said, at 2:

> NSPE has no fee schedule, has no intention or wish to have a fee schedule, and has no desire either to attack or defend fee schedules. That position has been made plain to Appellee from the earliest days of this litigation. Some other engineering societies—like some bar associations—have fee schedules. Whatever merit or lack of merit such fee schedules may have is an issue to be decided in other cases.

That has been the consistent position of NSPE throughout this litigation, both before and after *Goldfarb*, and that continues to be NSPE's position before this Court.

D. NSPE Exhorts But Does Not Enforce The Ethical Principle.

The government brief argues, at 17-22, that NSPE "enforces" the ethical principle. Most of the argument relates to the selection of an engineering firm to redesign the Tri-State Airport at Huntington, West Virginia following a crash in which all members of a college basketball team were killed. J.A. 156. The government brief refers to this as "[a]n example" of NSPE action.

It is no such thing. The hearing relating to this matter was unique, was the first hearing ever held relating to section 11(c), and is the only hearing NSPE has ever held relating to that section. J.A. 162; NSPE Br. 23-24. To refer to this matter as "an example" is highly misleading.

More basically, the account presented in the government brief is inaccurate. The initial selection of an engineer in that instance was *not* by the traditional method, as stated in the government brief, at 19, but involved a comparison of proposed fees by a number of firms. J.A. 2419. The firm initially selected did *not* quote a fee but gave only "very rough estimates of overall engineering costs." J.A. 5618. The publicized figure of some $500,000 was *not* the fee quoted by the firm initially selected, but was based on a reporter's incorrect assumptions, and on a guess. J.A. 2421, 2422, 2426. Thus, the alleged "reduction" in engineering cost is entirely illusory and unsupported by the record.

The investigation of this matter was requested by the West Virginia engineering society, which believed that political influence was involved in the selection of the engineer, and that kickbacks to a local engineer were also involved. J.A. 5713. The investigation corroborated that a condition for selection of an engineering firm apparently was agreement to pay one percent of construction costs (more than 20 percent of the engineering fee) to a local engineer as "compensation" for his "past work" for the airport authority "as well as for those services rendered during execution of the contract." J.A. 2420-21, 2423-24. The investigation also provided some corroboration that political influence was involved in the selection of the engineer. J.A. 2422, 2427-28. One member of the airport authority stated that it was "trying to give the appearance of ethical negotiations but was not." J.A. 2423. He further stated that "the final cost

would have been less if normal negotiations had been permitted to proceed as initiated." J.A. 2423. No action as a result of this investigation was taken by NSPE, by any of the state societies, or by anyone else so far as the record shows. J.A. 163, 5724.

Under any view of the facts or theory of law this situation surely warranted investigation. It cannot be evidence of a Sherman Act violation to investigate political influence, kickbacks and similar influences in the selection of professional consultants, or to express the view that bidding in the selection of engineers facilitates these abuses.

The government brief's reference to an alleged NSPE effort to frustrate an experimental Defense Department bidding scheme is similarly without foundation. That matter is detailed in NSPE's brief at 83-85 n.253, and *infra* at VI. In sum, NSPE did not frustrate the Defense Department experiment; the experiment was dropped before it was implemented *because Congress legislated against it.*

The government brief attempts to suggest, at 21 n.22, that NSPE engaged in other "enforcement activity." Contrary to that aspersion, review of each alleged instance of NSPE "enforcement" cited in the government brief shows that in *none* was any more involved than a statement to government officials regarding NSPE policy, and an explanation of the reasons for the policy. Nowhere in the record is there even a scintilla of evidence that NSPE has engaged in any coercive or covert practices or activities, or done anything other than advocate. Moreover, no person has ever been expelled from or in any way disciplined by NSPE for engaging in competitive bidding. F.D. 36, J.A. 9968-69.

That NSPE does not engage in "enforcement" is corroborated by the testimony of every practicing engineer

in this litigation. Each testified that he refused to engage in soliciting business by bidding as a matter of principle and because it is unfair to the client and dangerous to the public, and not because of NSPE or the NSPE Code of Ethics. See J.A. 175-81, 183-84 (Louis Bacon); 382-84, 394-99 (Joseph Lawler); 690-94, 838 (James Shivler); 929-69 (J. Neils Thompson); 1247-57 (George M. White); 1282-83, 1379-83 (William R. Gibbs); 1696-98, 1706, 1724 (James L. Polk); 1997-99, 2003 (Donald E. Marlowe); 1672-73 (John G. Dillon).

Thus, the record shows that NSPE does—as it stated in its answer to the complaint, as it has admitted throughout this litigation, and as it is doing in its briefs—advocate, explain and exhort the ethical principle. The record shows nothing more than this. NSPE's position, like that of the eminent engineers who testified, is a principled position based on the facts and considerations detailed in its brief. If these activities of a professional society are illegal, then the Court's statement in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, at 761-62 (1976) is meaningless—and the First Amendment signifies much less than this Court has proclaimed. See NSPE Br. 82.

E. The Traditional Method Of Selecting An Engineer Fosters Real Competition.

The government brief asserts repeatedly that the prohibition of bidding for engineering design work eliminates competition. The government's assertion is based on unexamined dogma, not the facts of this case. The evidence in the record, to which the government brief and the lower courts made no reference, holds that the traditional method, far from eliminating competition, makes competition possible, both in the procurement of engineering design services and in construction bidding. The evidence establishing these facts is summarized in

NSPE's brief at 8-35. For example, there is substantial and unrebutted evidence that bidding as a method of obtaining engineering design, far from being competitive, would raise barriers to competition, by reducing the ability of small engineering firms and solo practitioners to compete with large, established engineering firms. See J.A. 1021-23, 1705-06, 2340-41, 3353, 3380.

There can be no competition between sellers when the prospective buyer must choose among them without knowing what they are offering. The evidence shows that bidding in the peculiar circumstances involved here is not a competitive procedure, but a lottery, where each bidder hopes he has the winning number. This is true because in the circumstances of this case the prospective client (the buyer) cannot know at the time bids are tendered what any bid represents—any more than the engineer can know what the engagement involves before he studies the problem, consults the client and proposes an approach to its solution. See NSPE Br. 8-21. The selection of engineers by bidding is a purely formal procedure which lacks substance, which substitutes for and prevents genuine competition among engineers, J.A. 1236-37; and which also frustrates effective competitive bidding at the far more expensive construction stage. These facts are not even mentioned in the government brief. See NSPE Br. 18-21.

IV. ON THE BASIS OF A RULE OF REASON ARGUMENT, THE GOVERNMENT BRIEF ILLOGICALLY URGES AFFIRMANCE OF A *PER SE* DECISION.

The government brief is founded on the fallacious premise that application of the rule of reason to this case requires affirmance of the *per se* decision below. The government brief's only three contentions are, first, that "The NSPE ban is not justified by the nature of engineering services" (Point IA); second, that "Price com-

petition [sic] for engineering services is feasible and practical" (Point IB); and third, that the judgment "does not violate NSPE's First Amendment rights . . . ." (Point II). G. Br. 31-35. The government brief claims that the first contention is established by *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that the second contention is established by evidence and findings in this case, and that the third contention (considered *infra*, at VI) is established by the four corners of the judgment itself. *Id.*

Contrary to the government brief, there is no basis for deriving from the *Goldfarb* opinion any conclusion as to whether "the NSPE ban is . . . justified by the nature of engineering services." *Goldfarb* involved neither engineering nor ethics nor solicitation by bidding. *Goldfarb* involved only the question whether a mandatory minimum fee schedule was legal under the Sherman Act merely because it was employed by a professional group rather than a business group. The government's own brief as *amicus curiae* in *Goldfarb* stated, at 7, "The only question is whether the antitrust laws apply to the most commercial aspects of legal practice—the fixing of minimum fees." This Court's opinion in *Goldfarb* stated that "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act", and the Court made clear that it was intimating "no view on any other situation than the one with which we are confronted today." 421 U.S. at 788-89 n.17.

Thus, the government's first contention, that *Goldfarb* shows NSPE's ethical provision to be "not justified by the nature of engineering services", is wrong. See G. Br. 32-33. The reasons why the ethical canon *is* "justified by the nature of engineering services" are stated at pages 5-35 of NSPE's brief.

The government brief's second contention is also wrong. Contrary to statements throughout the government brief (*see, e.g.*, G. Br. 35, 39, 40, 48), there is not a single finding in this case that bidding in the engineering field is either "feasible" or "practical." Every time Congress has considered the question it has held bidding in engineering infeasible and impractical. See NSPE Br. 24-27, 61-65. The testimony of more than a dozen expert witnesses in this case that bidding is infeasible and impractical, and the same conclusion of virtually every government body and engineering client which has considered the question, prove that bidding to secure an engineering design engagement is a sham and ill-serves the public. The lower courts declined to consider this record evidence, and made no findings on the subject.

If, however, there *had* been findings below that fee bidding in engineering is "feasible" and "practical" as the government brief contends, *a fortiori* the judgment would have to be reversed, since the lower courts ruled that they would "not consider" these issues. 389 F. Supp. 1199, J.A. 9938; 404 F. Supp. 460-61, J.A. 9988-90; 555 F.2d 983, Cert. App. A-11 - A-12. If, as the government brief claims, the lower courts had found that fee bidding in engineering, "will not endanger public safety", then the judgment—which is based on *per se* theory excluding that matter from consideration—unquestionably must be reversed. *See, e.g., United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). Similarly, if the lower courts held the ethical rule unreasonable because, as the government brief contends at 34 and 50-56, there are other adequate safeguards of public safety, the judgment must likewise be reversed, since the lower court decisions eschewed consideration of all public safety aspects of this case.

If, contrary to the government brief's contention, the lower courts did not consider the reasonableness of the

ethical provision, they plainly disregarded controlling precedents. See NSPE Br. 47-54; *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Northern Pacific Railway* v. *United States*, 356 U.S. 1 (1958); *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

The government brief fails to distinguish any of the Sherman Act Section 1 decisions of this Court upon which NSPE relies. The government brief fails to distinguish the 1911 *Standard Oil* and *American Tobacco* decisions, the 1918 *Chicago Board of Trade* decision, the 1925 *Maple Flooring Mfrs.* decision, the 1963 *White Motor Co.* decision, the 1977 *Continental T.V.* decision, or any of the others. See NSPE Br. 45-54. The government brief also fails to rebut the common law authorities and Sherman Act legislative history which show three centuries of precedent supporting NSPE's position. *Id.* at 45-51.

The government brief's sole reference to the leading case of *Chicago Board of Trade* v. *United States*, *supra*, consists of a perfunctory footnote stating "that the alleged restriction" in that case "only peripherally affected price, and . . . in fact enhanced competition by assuring equal access to information necessary to rational decision making." G. Br. 47 n.39. Apparently, the government has changed its view of the facts in *Chicago Board of Trade*, which it argued quite differently when it briefed that case in this Court. The government brief in *Chicago Board of Trade* is radically inconsistent with its present description of that case. The government brief in *Chicago Board of Trade*, at 9, just like the government brief here, charges price fixing and restraint of trade "within the narrowest definition of the term", but argues unreasonableness. Every single argument the government makes here was made by the government and rejected by this Court in *Chicago Board of Trade*, 60 years ago. For the Court's convenience, the government brief in

Chicago Board of Trade is submitted as an addendum hereto. Review of that brief will demonstrate to this Court that the government contended in *Chicago Board of Trade*, as it does here, that the restriction on bidding involved was price fixing which could not be justified as a matter of fact or law.

We agree with the government's current characterization—that *Chicago Board of Trade* involved an arrangement which "enhanced competition by assuring equal access to information necessary to rational decision making." The principle attacked here does exactly the same thing. We disagree with the contrary characterization the government made when it briefed that case, just as we disagree with the government brief's mischaracterization of the provision involved in the instant case. See NSPE Br. 10-15, 18-21.

NSPE submits, as it has continuously in this case, that *Chicago Board of Trade* is controlling here. Affirmance of the *per se* judgment in this case would produce the unseemly result that an agreement among 1600 commodity brokers not to bid, in order to preserve an orderly market, is measured by the rule of reason; whereas professional ethics against bidding in engineering, which are defended on the ground of imperative public safety considerations, are *per se* illegal.

Moreover, the government brief completely misapprehends the significance of this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 97 S.Ct. 2549 (1977). The government brief merely asserts, at 39 n.33, the innocuous proposition that *Continental T.V.* "did not undermine the rule that price-fixing . . . is illegal *per se*." What the government brief fails to distinguish, controvert or mention, however, is this Court's statement in *Continental T.V.* that the rule of reason in antitrust, not the *per se* rule, continues to be "the prevailing standard

of analysis." 97 S.Ct. 2557. See NSPE Br. 45-54. Where, as here, even the government brief argues the issue of reasonableness, there is no basis in the decisions of this Court—and the government brief cites none—to apply *per se*.

The fact that the government brief argues affirmance of a *per se* decision on the basis of rule of reason contentions is also demonstrated by the final note in the government brief's antitrust section, note 47 at page 56. There, the government asserts that NSPE is free to submit a modified ethical provision on bidding to the District Court for approval. Does the government ask this Court to hold that a litigant is entitled to a hearing on the reasonableness of its conduct after, but not before, entry of judgment? If, as the government contends, the principle at issue is *per se* illegal, how can NSPE obtain a judicial ruling that another statement of it is reasonable and hence lawful? If, as the government brief now contends, NSPE is free to promulgate a differently-worded ethical rule, why has the Antitrust Division for five years refused NSPE's request to negotiate such modification? Why has the government waited until its Supreme Court brief to argue the issue of reasonableness?

V. THE GOVERNMENT BRIEF MISSTATES THE ISSUES.

The government brief, at 2, misstates the questions presented. The antitrust issue here is not "Whether a comprehensive [sic] ban on competitive price bidding for engineering services collectively agreed to and enforced [sic] by the National Society of Professional Engineers, violates Section 1 of the Sherman Act." Nor is the constitutional issue "Whether the judgment of the district court, enjoining the Society from taking actions or making statements *that would have the effect of perpetuating its unlawful ban on competitive price bidding*

for engineering services, is consistent with the First Amendment." (Emphasis added.) Contrary to the government's polemic, the record evidence, which the lower courts expressly refused to consider, and which none of the lower court opinions discussed, establishes that: (1) the ethical provision is *not* "comprehensive"—but rather applies only where public safety is directly at risk; (2) bidding for engineering design services before the facts can be known is not "competitive", but is a mere form, a sham, and inherently deceives clients; (3) NSPE has *not* "enforced" the provision or expelled or in any manner disciplined anyone for violating it; NSPE has, as a matter of principle, exhorted engineers, government and private clients to abjure the dangerous and unethical practice of bidding before the facts can be known; and (4) the judgment does *not* enjoin the "perpetuation of [an] unlawful" arrangement, but rather enjoins expression, advocacy, association and publication of a long-held ethical belief embraced by reputable engineers and engineering clients throughout the United States, including the government. See NSPE Br. 5-35.

VI. THE GOVERNMENT BRIEF FAILS TO MEET THE DEMONSTRATION THAT THE JUDGMENT ABRIDGES FIRST AMENDMENT RIGHTS.

The government brief neither distinguishes nor discusses the authorities cited in NSPE's brief, at 80-91, all of which support the view that the judgment in this case violates the First Amendment. Instead, the government brief asserts, at 58, that the judgment "does no more than is necessary." However, contrary to the District Judge's view, and contrary to the government's continuing view, the issue is not how much prior restraint on speech, association and publication the government contends is "necessary", but whether the judiciary should independently consider if the Constitution permits a de-

cree this broad on the facts of this case, or on any facts. Contray to the government brief at 56-57 n.48, the district court has continuously declined NSPE's requests that it review the scope of the judgment. See NSPE Br. 38-39, 77. The circuit court, too, did not scrutinize the judgment in light of the facts, but upheld most of it, wholly under the authority of three cases which, as NSPE's brief shows at 86-88, stand for a different proposition than that for which the circuit court cited them.

As NSPE's brief notes, at 38-39 and 77, the District Judge stated to counsel that the judgment contained unnecessary provisions, and went too far. When the government attorney refused to accede to any modification, the District Judge entered the judgment precisely as presented to him by the government attorney. The District Judge stated that the prevailing party is entitled to the form of judgment it wants. The government brief does not, and cannot, controvert these facts. Indeed, counsel for NSPE presented several alternative forms of judgment to the District Judge, each containing remedial provisions, but these were rejected by the government attorney out of hand, and the District Judge gave them only a few moments' attention.

Thus, the delegation by the District Judge of the judgment-drafting function to the prevailing party produced the unconstitutionally overbroad product now before this Court. This Court's statement in *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296 (1941), applies:

> In the exceptional cases warranting restraint upon normally free conduct, the restraint ought to be defined by clear and guarded language. According to the best practice, a judge himself should draw the specific terms of such restraint and not rely on drafts submitted by the parties.

This Court has stated that it will scrutinize painstakingly judgments not "drawn with the insight of a disinterested mind", but which were adopted verbatim from a litigant's submission. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964); *see also United States* v. *Ward Baking Co.*, 376 U.S. 324, 330-31 (1964); *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945); NSPE Br. 59 n.210. The Court has "freely modified decrees in Sherman Act Cases", *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185 (1944); *Hartford-Empire Co.* v. *United States*, 324 U.S. 570 (1945), and not infrequently has reviewed such decrees paragraph-by-paragraph, *e.g.*, *United States* v. *United States Gypsum Co.*, 340 U.S. 76 (1950); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Such review is particularly appropriate where, as here, the district court purported to effectuate this Court's mandate. *United States* v. *E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 323 (1961). See NSPE Br. 77-91.

As NSPE's brief details, at 79-80, and the government brief does not deny, the judgment restrains advocacy or endorsement by NSPE even of Supreme Court decisions and United States statutes on point. For example, the following statement is apparently prohibited by the judgment, although the statement is clearly correct and constitutionally protected:

> The Brooks Act (40 U.S.C .§§ 541-544) and other United States statutes and regulations prescribe the traditional method of procurement of engineering services for all branches of the federal government. Numerous state laws and regulations establish similar requirements. NSPE approves of and supports these laws and regulations. It is unethical for an engineer to solicit work by fee bidding from a federal or state government agency subject to such a law or legal requirement. If a government agency subject to such a legal requirement requests an en-

gineer to submit a fee bid, the engineer should inform the agency of the applicable law or regulation and request that the procedure be changed to comply with the statute or regulation. It is also proper for an engineer to advise prospective clients not subject to such laws or regulations of federal policy as stated in the Brooks Act and of the policy of states with similar laws or regulations, to explain the reasons underlying the procurement procedure required by such laws and regulations, and to request the prospective client to follow the procedure adopted by most government entities in this country.

The judgment in this case, which appears to prohibit even the foregoing endorsement of United States statutory policy, goes beyond any scope even arguably necessary to remedy a Sherman Act violation.

The government brief contends, at 60, that "Nothing in the judgment prevents NSPE and its members from attempting to influence governmental action." Ironically, however, the government brief argues, at 60 n.53, that the judgment itself is based on what the government brief asserts was an improper attempt to influence government action, relating to the Defense Department's 1970 bidding proposal. As the government's own exhibit shows, however, the government brief is dead wrong on the facts. See NSPE Br. 82 n.253. The reason the Defense Department did not proceed with its bidding experiment was *not*, as the government brief contends at 60 n.53, because of a "boycott" by NSPE or anyone else. The Defense Department terminated the experiment for the reason stated in its own memorandum, which the government offered into evidence:

MEMORANDUM

TO: Assistant Secretary of the Army
Installations and Logistics

Assistant Secretary of the Navy
Installations and Logistics

SUBJECT: Joint Review of A/E Contracting

Reference is made to my memorandum of 3 August 1970, same subject. This memorandum is to advise of the Congressional action relative to this matter. Section 604 of the FY 1971 Military Construction Authorization Bill, H.R. 17604, states that such contracting "unless specifically authorized by the Congress . . . should continue to be awarded in accordance with presently established procedures, customs, and practices."

The test proposal, therefore, which had been planned is consequently withdrawn.

/s/ Barry Shillito
Assistant Secretary of Defense
Installations and Logistics.

[J.A. 6072]

Thus, the government's own exhibit conclusively establishes that it was Congressional action forbidding the Defense Department scheme, and not NSPE action, which caused the Defense Department to withdraw the scheme before implementing it.

The judgment—by its express terms and by the construction for which the government brief appears to argue —would forbid NSPE to inform its members or the public of facts relating to professional engineering practice, and of the informed opinion of engineers concerning procurement practices that do and do not serve the public interest. These are social and political matters on which it is important that all, including those best informed, be

permitted to speak freely. Regardless of the ultimate conclusion as to propriety under the Sherman Act of specific acts, free speech, association, publication and discussion cannot constitutionally be throttled. If the judgment is permitted to stand in its present form the Sherman Act will be transformed into an instrument of ideological repression. See NSPE Br. 77-91.

VII. SELECTION OF ENGINEERS BY BIDDING ENDANGERS PUBLIC SAFETY.

The government brief argues, at 50-56, that selection of engineers by bidding (mischaracterized as "price competition" by the brief) will not endanger public safety. G. Br. 50-56. We have shown that this argument is irreconcilable with the basic premise of the government case and of the lower court decisions holding the principle *per se* illegal. The government brief's contention is also contrary to the record, and warrants response.

The government argument consists of several peripherally related points. The government brief asserts, at 50, that the exclusion of R&D projects from the principle's scope shows that NSPE is not concerned about safety. This totally disregards the plain reasoning of the NSPE position. The 1962 BER opinion originally holding the principle inapplicable to R&D stated that this was because R&D contracts were for prototypes rather than structures. This holding has stood unaltered since 1962, not 1972 as the government brief erroneously states. NSPE's reasoning was succinctly stated by Paul Robbins in testimony:

> R&D projects do not normally result in a product for the use of the public. It results in a prototype which will be extensively tested and determined and probably a greater concern given to it before it is ever released. The R&D ends before the public use. [J.A. 1790.]

The government brief then refers, at 51, to the "When-in-Rome" clause which for a two-year period from 1966 to 1968 sanctioned bidding in foreign countries, when required by those countries' laws or customs. NSPE has never contended that the bidding procedure is not as hazardous abroad as it is in this country. The "When-in-Rome" clause was an early effort to cope with the extremely difficult problem of doing business in foreign countries where morals, ethics and laws are quite different from our own. Even today practices regarded as unethical or illegal in this country are often engaged in abroad by businesses, citizens and governments. NSPE did, for a two-year period, sanction unsafe engineering practices in foreign countries which required such practices. What is notable, however, is that as early as 1968 NSPE dropped this clause and refused to approve overseas practices it regarded as unsafe. It is common knowledge that the United States Government itself has not been as sensitive as NSPE, and engages in practices, such as export quotas and minimum or "trigger" prices, which would be illegal restraint of trade if undertaken domestically. Some foreign countries permit or require membership in cartels, or require adherence to particular religious or political parties, or forbid free speech, or engage in other practices abhorrent to our legal system. The brief variance in standards between domestic and foreign practice reflected by the "When-in-Rome" clause proves only that NSPE reaffirmed, years before the complaint in this case, the imperative duty of American engineers to preserve public safety even in foreign countries which subordinate that value to mercantile considerations.

The government brief argues, at 51-52, that the safety consideration "proves too much" as it might "justify the elimination of price competition in large segments of our economy." This "slippery slope" argument is based on the semantic trap that the government brief has con-

structed by identifying "price competition" with bidding in engineering. As detailed in the NSPE brief and below, these are not the same.

It is indisputably clear that the ethical principle at issue in this case is entirely different than activity described in antitrust cases as "elimination of price competition." The principle, which is the same as the Brooks Act procedure, requires that each engineering project be separately negotiated between the client and the engineer with the fee freely determined by the client and engineer according to the demands of the particular project. The ethical principle relates to the time and manner of establishing a fee, not the amount of the fee. There is no valid analogy between this principle and an agreement among construction contractors or sub-contractors or manufacturers of drugs or cosmetics on a price for their services or goods. The only conceivable analogy to the principle involved here would be an agreement among construction contractors that they would consider it deceptive to bid on a construction project before the engineering design and plans had been disclosed.

The government brief's intimation that any agreement among contractors, sub-contractors or manufacturers based on protection of the public is *per se* illegal is clearly not the law. Many salutary agreements among businessmen establish safety standards for electrical equipment (certified by the familiar "UL" label) and other building materials. To our knowledge, it has never previously been suggested that such agreements are illegal *per se*, or that their legality can be determined without reference to the public safety considerations on which they purport to be based.

After arguing that the unethical practice does not endanger the public, the government brief argues, at 52, that "professional traditions" in engineering preserve public safety. The government brief utterly fails to

explicate how "professional traditions" will operate unless specified in ethical codes. The government brief merely asserts, at 52-53 n.42, that adequate safeguards are provided by generalized statements, such as section 2 of the NSPE Code, which broadly states that "The engineer will have proper regard for the safety, health, and welfare of the public. . . ." The view espoused in the government brief would emasculate professional ethics. It would confine them to general statements, or bromides, and would preclude the professions from contributing that which they are best qualified to contribute—specific statements of the proper course for professionals to follow in the special circumstances of each profession. Apart from that, the government brief's view is unsupportable. If engineers interpret their duty to protect public safety, as expressed in section 2 of the Code, to impose the same ethical course more specifically described in section 11 (c), the issues of this case would remain in exactly their present posture. A retreat into generalities will not advance the analysis of the case.

The government brief argues, at 54-55, that high professional standards in engineering are unnecessary because of state regulation and local building codes. This argument was specifically answered by Sprigg Duvall, whose wide, intimate and detailed knowledge of the actual operation of professional engineering was based on insuring more than 60 percent of the practicing engineers in this country. He had personally investigated or supervised the investigation of accidents and defects allegedly caused by engineering malpractice over a period of more than seventeen years, and he maintained and analyzed statistics on the subject. J.A. 976-87, 999-1001. Mr. Duvall was emphatic in declaring that professional ethics are "a much stronger force" in protecting the public interest than either registration laws or building codes, pointing out that many registration laws are not specific, and that building codes provide minimum standards and

are often outdated. J.A. 1067-68, 1028. In short, the government brief's argument makes about as much sense as arguing that the Sixth Commandment is a bad idea because we have statutes prohibiting homicide.

Finally, the government brief falsely asserts, at 55, that there is no evidence that bidding was a factor in the engineering accidents and defects identified in NSPE's brief. Massive record evidence demonstrates the connection between the bidding procedure and dangerous engineering. A few examples follow:

Mr. Duvall testified that: "We do not insure any [engineering] firms that do bid. As a matter of fact in construction management which is let's say usually a customary service for engineers and architects, we will be excluding from coverage for engineers and for architects any project which they do competitively bid as a construction manager." J.A. 1016. He said this was because the risk of poor quality work was too great on jobs awarded to A/Es by bidding. J.A. 1017. He testified he did not understand how engineers could bid their services, because their principal function was to determine the best solution to the owner's problem, and that until that had been done the engineer could not know his costs, and thus could not prepare adequate plans and specifications on the basis of bidding. J.A. 1025. Competent and adequate professional engineering services are very definitely related to public health and safety. This is shown by the collapse or other failure of structures resulting in bodily injury or death brought to Mr. Duvall's attention in claim reports. J.A. 1027-28. He then described a number of such accidents, which are identified in NSPE's brief, at 28-29. J.A. 1028-53. On cross-examination, he testified that most firms try to provide the best professional services they can, but that when there is an economic crunch, and income is not enough to cover the expense of doing a job, some firms downgrade the services

they provide, and frequently the result is professional liability claims. J.A. 1061. Mr. Duvall made it plain that extensive experience and investigation showed that engineers who did not engage in bidding had fewer liability claims against them than those who engaged in bidding or fee cutting. J.A. 1012-16.

Louis Bacon, head of a large Chicago engineering firm, J.A. 134-36, testified on cross-examination that bidding in selecting an engineer was against the public interest. He described a case where a company obtained its engineering services by bidding, and the result was a building whose structural members could not bear the necessary weight. Investigation showed that the building had originally been designed inadequately. J.A. 261-64.

Dr. Marlowe described in detail two cases where the quality of engineering design was adversely affected by bidding. J.A. 2003-05. On cross-examination he testified that one of these cases, involving a District of Columbia building in danger of collapsing, was investigated by the D.C. Board of Engineering Registration, that basic engineering errors were discovered involving inadequate columns, and that the engineer responsible explained that his negligence was due to his being pressed for time and money after securing the job by bidding. J.A. 2010-15.

William Gibbs, partner in a large Kansas City engineering firm, testified that his firm would not engage in bidding because bidding does not permit providing quality engineering service or protection of public health, welfare and safety. J.A. 1283. He said he had seen many examples of inadequate engineering that endangered public health and safety, in water treatment plants, sewage treatment plants, roads which failed under traffic loads and bridges which collapsed. Based on discussion with other engineers who knew the situation he believed that there is a connection between the inadequacy of the

engineering work and price bidding in soliciting or securing the work. J.A. 1283-86. On cross-examination Mr. Gibbs testified that he had personally observed the inadequacy of engineering work done by engineers who solicited work by bidding or fee cutting. J.A. 1321-27.

George M. White, Architect of the Capitol, who had many years experience as a practicing engineer, testified, based on experience, that bidding is an unreasonable method of selecting professional engineers, and would be detrimental to society in terms of health, safety and public welfare. J.A. 1230-36. The risks, he said, are that buildings may fall down and bridges collapse. The long run effects would be that the quality of engineering service will decline. This will adversely affect fire safety, structural integrity and water supplies. Over a period of years the detrimental effects will be "astronomical" and highly destructive of the society in which we live. J.A. 1252-57.

The testimony of these, and other, witnesses expresses the professional judgment of leading experts with the highest qualifications and years of experience in a specialized, technical field. The government brief seems to argue that there can be no evidence of a relationship between selection of engineers by bidding and public health and safety without eyewitness evidence identifying the particular engineer who engaged in bidding to get a job and then committed an observable blunder which he confessed was attributable to his soliciting the work by bidding. In addition to their direct personal observations, the experts who testified were well within the limits of permissible expert opinion evidence in drawing obvious conclusions from years of observation and practical experience informed and guided by thorough knowledge of the technical field. There is no contrary evidence.

The massive expert testimony in this case certainly warrants at least an inference in the mind of a reasonable man that there may be a serious danger to public health and safety. Even the prospect of an inference that a danger of such magnitude exists must prevent rational lawyers from deciding on the basis of *a priori* principles and abstract legal theories that the danger to the public health and safety cannot be considered by the law.

VIII. THE REASONABLENESS OF PROFESSIONAL ETHICS, WHICH ARE "THE CONSENSUS OF EXPERT OPINION AS TO THE NECESSITY OF SUCH STANDARDS", MUST BE CONSIDERED TO DO JUSTICE.

Perhaps the most basic defect of the government brief is that it fails to identify any prejudice to the government or the public which could result from application of the rule of reason in this or any similar Sherman Act attack upon professional ethics. This failure, we submit, was not inadvertent or by reason of lack of effort of government counsel; there simply is no such prejudice.

NSPE's brief, by contrast, is devoted primarily to a summary of record evidence demonstrating the public interest aspects of this case. The manifest prejudice to NSPE, and to the public, which would result from the *per se* standard's application here is that *per se* precludes judicial consideration of the evidence. Unless the engineering profession, its clients, the government and NSPE's brief are completely wrong, the public will needlessly suffer economic waste and be endangered as a direct consequence of the judgment the lower courts entered. The prejudice resulting from application of *per se* is profound.

Regardless of what standard of law is applied in this case, it cannot be denied that the principle attacked represents the clear "consensus of expert opinion as to the necessity of such standards." *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935).

We have shown that the "consensus" involved in this case long preceded NSPE's formation, and is deeply ingrained both in engineering ethics and in law. We freely concede the possibility that any consensus of expert opinion can be wrong, or that a profession can go too far in pursuit of a laudable objective. For example, this Court in *Bates* v. *State Bar of Arizona*, 97 S.Ct. 2691 (1977), held the consensus of expert opinion in the legal profession wrong insofar as that consensus prohibited advertising the availability of certain routine, repetitive legal services. The Court did not, however, require "the baby . . . to be thrown out with the bath", *International Salt Co.* v. *United States*, 332 U.S. 392, 405 (Frankfurter, J., dissenting). To the contrary, in *Bates* the Court took pains to distinguish the "baby" from "the bath." It is exactly such analysis which the *per se* rule forbids.

Professions are not above the law, as this Court made clear in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). As the Court recognized in *Goldfarb*, however, considerations bearing on professional practice are not identical to mercantile considerations. A central problem professional ethics address is maintaining the service motive against the bias of profit making. J.A. 612-13. Another fundamental object of professional ethics is to prevent practitioners from making misleading representations to clients, which practitioners are peculiarly able to do by reason of the nature of the professional-client relationship. J.A. 617-21. It is axiomatic and essential that these characteristics of professional ethics restrict mercantile market forces. If professional ethics are to have a future role, the antitrust laws must recognize that there are differences between the marketplace standards of commercial selling and the standards of ethical professional-client relations.

Petitioner asks no favored treatment for the professions. Petitioner asks only that the legitimate interests

and needs of clients and the public be considered, in this case, in the light of reason.

CONCLUSION

For the reasons stated in the Brief for Petitioner and herein, the judgment below should be reversed, and judgment entered for Petitioner.

Respectfully submitted,

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January 11, 1978

ADDENDUM

In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 98.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern District of Illinois enjoining the Board of Trade of the City of Chicago, its officers, directors and members, in a suit by the United States under the Anti-Trust Law, 26 Stat., 209, c. 647, from giving effect to a certain provision of what is known as the "Call Rule," adopted by the Board in 1906.[1]

The rule in its entirety reads as follows:

> Sec. 33. A. The Board of Directors is hereby empowered to establish a public "Call" for

[1] *Subsequently* to the institution of this suit this rule was abrogated.

corn, oats, wheat and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.

B. Contracts may be made on the "Call" only in such articles and upon such terms as have been approved by the "Call" committee.

C. The "Call" shall be under the control and management of a committee consisting of five members appointed by the president with the approval of the Board of Directors.

D. Final bids on the "Call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day.

E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct and upon conviction such members shall be suspended from the privileges of the association for such time as the Board of Directors may elect. (Pet., R. 5; Ans., R. 11.)

The Board maintains at Chicago a commercial exchange for dealings in grain, provisions, and other commodities. Its membership includes not only brokers and commission merchants, but proprietors of elevators, and millers, malsters, manufacturers of corn products, and others who buy and sell grain and provisions on their own account—more than 1,600 in all. (Canby, R. 19, 20.)

We borrow from the brief for appellants the following statement of the kinds of trading in which members of the Board engage:

> Grain, after it has reached Chicago and is either in cars or elevators, is extensively sold by sample and warehouse receipts. The rule in question does not relate to this kind of trading. (Rec., 111.)
>
> Another kind of trading (Rec., 10, 115) consists in the making of contracts of purchase and sale for delivery in a future month. The Board of Trade provides a space called a "pit," for each of the leading commodities so traded in, to which members desiring to trade for future delivery in such commodity resort. * * * The rule in question does not relate to this kind of trading.
>
> A third kind of trading—and the one to which the rule *does* apply—is the purchase and sale of grain "to arrive." This consists in sending out from Chicago daily bids for grain by members of this Board of Trade,—generally by mail, but occasionally by telegraph,—to grain dealers at country points within the grain section tributary to Chicago. The terms of such trading permit the shipment of the grain within a certain number of days—usually ten, but sometimes more. (Rec., 146.)
>
> These bids prescribe the time, within which the acceptance of the offer must be received in Chicago by the bidder, and this is usually before the opening of the market at 9:30 a. m. the next morning. (P. 3.)

The "Call" immediately follows the regular session [1] and lasts about half an hour, usually ending before 2 p.m. (R. 117, 139.) To all intents and purposes it is simply a prolongation of the regular session. (Nichols, R. 108.)

The witness Canby, president of the Board, described the operation of the "Call" as follows (R. 20):

> What is termed the "Call" was what you might call an auction. In other words, these prices were bids and offers. It was held during the early part of the afternoon, held at the close of the day's business in one corner of the Board of Trade. The caller had a stand and stood up and called the different grades of grain, and as he would call each grade he would ask for bids, and all the members that desired to send bids out in the country that afternoon to buy grain to arrive would bid on this call, and they could bid, every one bid any price they wanted to send out.

After the close of the "Call" trading proceeds as follows, as exemplified in the typical case of the Armour Grain Company:

> * * * the Armour Grain Company, after the Call was over, took the prices which were established on the Call and put our bids into the country on the basis of those prices. * * * We mailed those cards wherever the grain was; wherever we thought we could buy any grain we put the bids in. (Marcy, R. 91.[2])

[1] The regular session is from 9:30 a.m. to 1:15 p.m.; on Saturdays, from 9:30 a.m. to 12 n. (R., 11.)

[2] Other members testifying to the same effect were Stream, R. 99; Pierce, R. 100-101; Glaser, R. 101-102; Eckhardt, R. 114.

The points to which these bids were sent were located not only in Illinois, but in the grain-growing sections of other States tributary to the Chicago market—Ohio, Indiana, Missouri, Nebraska, Kansas, Iowa, North and South Dakota, Minnesota, Wisconsin. (Stream, R. 99; Marcy, R. 91; Pierce, R. 101; Eckhardt, R. 114.)

The provisions of sub-division D of the rule, reading—

> It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day,

as construed and enforced by the Board, absolutely prohibits members from competing as to price in the purchase and sale of corn, oats, wheat and rye at these country points, for Chicago delivery (i.e., grain "to arrive"), in the interval between the close of the "Call" and the opening of the regular session on the next day, by requiring all to quote the same price, namely, the final bid on the "Call" less the regular commission. (R. 96, 99, 100-101.)

It is this provision only which the Government now assails.

The charge of the bill is that by adopting and enforcing this provision, the Board, its officers, directors and members became parties to a combination in restraint of trade in violation of the Anti-Trust Law. (R. 5-6.)

The answer, while admitting the adoption and enforcement of the provision and its effect substantially as above stated (R. 11), avers that the purpose was not to prevent competition or to control prices (R. 11), but (a) to promote the health, comfort and welfare of members "by restricting their hours of business" (R. 11, 13), and (b) to break up a monopoly in this branch of the grain trade alleged to have been acquired by four or five large warehousemen in Chicago (R. 12).

On motion of the Government the allegation of the last-mentioned purpose was stricken from the answer on the ground that even if true it constituted no defense. (R. 15, 16.)

After a hearing the District Court entered a decree sustaining the charge of the petition and enjoining the Board, its officers, directors and members, in substance, from continuing to observe or give effect to the assailed provision, and from adopting or observing any rule or regulation of like character. (R. 165-167.)

ARGUMENT.

I.

BY ADHERING TO THE RULE IN QUESTION THE BOARD, ITS OFFICERS, DIRECTORS, AND MEMBERS, BECAME PARTIES TO A COMBINATION TO FIX A UNIFORM PRICE FOR BIDS FOR GRAIN AT COUNTRY POINTS, FOR CHICAGO DELIVERY, BETWEEN THE CLOSE OF THE CALL AND THE OPENING OF THE REGULAR SESSION ON THE NEXT DAY, THEREBY DIRECTLY AND SUBSTANTIALLY RESTRICTING COMPETITION AND RESTRAINING TRADE AMONG THE STATES.

The intended effect of the assailed regulation is to bind members of the Board to bid a uniform price in purchasing grain at country points, for Chicago delivery, between the close of the "Call" and the opening of the regular session on the following day. (Appellants' Br., p. 9.)

As stated, the points at which grain was thus purchased were located part in Illinois and part in neighboring States (*supra*, p. 5). The regulation, therefore, operated upon interstate commerce.

The manner in which this regulation restricted competition amongst members of the Board is best set forth in their own words contrasting conditions before and after the adoption of the regulation.

George E. Marcy, president of the Armour Grain Company (R., 96):

> The effect of the rule was that whereas before its adoption there were offers sent out by this, that and the other man here in Chicago through the wheat producing territory after the Board of Trade closed on one day,

bids send out at whatever figure the bidder wanted to name, after this rule was adopted that figure was the last named highest figure before 'Change closed on that day, and he was limited to that.

John P. Stream (R., 99):

Prior to the adoption of that rule we, and others on the Board of Trade, would arrive at a figure that we thought we could afford to bid for grain to arrive, based on conditions existing at that time, and we would send out those bids broadcast, and these were transmitted to the various sellers and owners of grain in the country by means of cards and telegrams, almost every day; they were sent over the grain territory, Iowa, Illinois, sometimes Nebraska, and Missouri and Indiana, sometimes Kansas. After the rule was adopted in 1906 we had to follow the rule, and send out the prices as made by the Call on that day. There was no other price to submit to these various sellers between the close of the Call and the opening of the Board the next morning at 9:30.

Charles B. Pierce, of Bartlett, Frazier & Company (R., 100-101):

I am familiar with the manner in which grain is purchased to arrive, and was purchased, prior to the adoption of the Call rule. We bought grain under the same methods we always have, and that we did then, and now, that is, by giving bids over night by post card and by letter, or through the day by telephone

or telegraph, as the case may be. Whatever our judgment indicated as the price that we desired to purchase at, that price was transmitted over the country on postal cards and by telegraph, prior to the adoption of this rule. And after this rule was adopted in 1906 the price communicated on grain to arrive by postal cards and telegrams was determined by the price fixed at the call, on all bids that we sent out while the market was not in session between the adjournment of the Call meeting and the opening of the Board upon the following morning. *If our judgment dictated that a higher price should be paid than that fixed on the Call, we could not offer that price.* [Italics ours.]

The potency of members of the Board in the grain trade is reflexly shown by the primacy of the Board among grain markets of the world. "Chicago," said the witness Patten, "is the greatest grain market in the world. The whole world looks to Chicago for its prices." (R., 103.) The answer itself avers that the Board "is a great commercial center for the transaction of business in wheat, corn, oats, rye and other grain." (R., 10.)

An agreement between men occupying a position of such strength and influence in any branch of trade to fix the prices at which they shall buy or sell during an important part of the business day is an agreement in restraint of trade within the narrowest definition of the term.

As the Circuit Judges observed in *United States* v. *United States Steel Corporation*, 223 Fed., 55, 155—

> When individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts.

Such agreements belong to the class described by the Chief Justice in the *Standard Oil Case*, 221 U.S., 1, 56, 59, as "in restraint of trade in the subjective sense"—agreements by which one "voluntarily and unreasonably restrains his right to carry on his trade or business"; or, in the language of Mr. Justice Holmes:

> They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Case*, 193 U. S., 197, 404.)

There is a complete analogy in principle between the present case and *Swift & Co.* v. *United States*, 196 U.S., 375, where it was held that an agreement of packers not to bid against each other in the purchase of cattle violates the Anti-Trust Law. The members of the Board of Trade agreed not to bid against each other in the purchase of grain at country points.

It is of no legal consequence that the restriction operates only during the afternoon. The afternoon is an important part of the business day, particularly in this branch of the grain trade. As defendants' witness Ray testified—

> You will find out in the country that a large percentage of the grain is bought in the afternoon, especially at this time of year and in December, when farmers have done lots of hard work all through the summer, and they became a little lazy like, get up late in the morning, and they hardly get to town to do business before about noon. (R., 128-129.)

Moreover, if such a restriction may be imposed in the afternoon, why may it not be imposed in the morning?

To the naive inquiry in appellants' brief (p. 19-20)—

> How can anyone affirm that the competition, *if delayed until the next morning*, will not be as keen, and result in as good prices, as if it took place in the preceding afternoon [italics ours],

we reply—

> It is not for the Board to ordain that owners of wheat at country points shall not have a competitive market in which to sell in the afternoon.

Counsel for the Board was at pains to bring out that a member desiring to buy wheat in the afternoon from an elevator *in Chicago* could do so without any restriction at all as to price; that the rule "did not in the slightest affect the price at which the owners

of wheat in elevators could sell." (R., 22, 23, 94, 111.)

This but emphasizes the illegality of the restriction.

Why make a difference between buying wheat in the afternoon from elevators *in Chicago* and buying wheat in the afternoon at country points for subsequent delivery in Chicago? Why should members be free to compete in the one case and restricted to one price in the other? Why should sellers of wheat *in Chicago* enjoy a competitive market in the afternoon while sellers of wheat at country points are denied one?

II.

THE CONTENTION THAT THE RULE WAS BENEFICIAL IN OPERATION.

It is claimed for the rule (a) that it "is nothing more than a rule limiting the trading hours of its members," with the object of promoting their health and comfort (Appellants' Br., pp. 15, 20, 26); (b) that by inducing more members to participate the rule has kept trading in grain "to arrive" from being monopolized by a few, as formerly (ibid., pp. 15, 17, 21); (c) that it has afforded those having grain to sell at country points a market in the interval between the close of business on the Board on one day and the opening on the next (ibid., pp. 16, 21); (d) that it has apprised such persons more promptly of the prevailing prices in the Chicago market (ibid., p. 21); (e) that it has enabled such persons to fulfill their

contracts by tendering grain arriving at Chicago on *any* railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer (ibid., pp. 16, 17, 21); (f) that it has enabled the grain merchants of Chicago to work upon a narrower margin of profit and thereby to pay more for grain and to sell cheaper, thus making the Chicago market more attractive to shippers and grain buyers (ibid., p. 21).

This is but another way of saying that good intentions and some good results can save the rule from illegality. Where, however, as here, the necessary effect of an agreement or combination is unduly to restrict competitive conditions, the purpose or intention of the parties is immaterial. Agreements or combinations producing that effect are prohibited by the Act of Congress; and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or purpose. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U.S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U.S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. *Bishop, New Criminal Law*, sec. 343; *Holmes, The Common Law*, p. 52.

In *Thomsen* v. *Cayser*, 243 U.S. 66, after hearing "the good intention of the parties, and, it may be, some good results," once more put forward as a

defense under the Anti-Trust Law, this Court disposed of the contention in language which should be final:

> The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.
>
> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. (P. 86.)

It follows, that were the good intentions or good results claimed in this case conceded, it would make no difference.

For this reason the District Court was right in striking from the answer, as legally irrelevant, paragraph 6 averring that one purpose of the "Call Rule" was to break up an existing unlawful monopoly in trading in grain "to arrive."[1] Moreover, the law, Federal and States, provides remedies for monopolies and restraints of trade.

As a matter of fact, however, with a single exception, none of the benefits claimed is attributable to the particular provision of the rule which the Government is attacking, i.e., the price-fixing restriction.

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[1] The fact is that all the circumstances and conditions leading to the adoption of the rule were brought out by the defendants at the trial, and in no possible view, therefore, were they injured by the striking of paragraph 6 from their answer. (R., 107-108, 112, 143-144.)

Neither that nor any other provision of the rule limits the hours of trading. As stated by the witness Nichols, who was produced by defendants and described himself as "in a sense the father of the rule,"

> We amended the rule prohibiting trading after 1:15 and established an afternoon session which was called the "Call," beginning practically at 1:30 and running until midnight or 9:30 the next morning if the traders cared to stay. (R., 108.)

So far, therefore, from being a measure to protect the health and comfort of members by restricting the hours of trading, the rule really removed a restriction of that character already existing, only, however, to impose a restriction as to prices.

Again, there is no apparent relation between the price-fixing restriction and the increase in the number of members of the Board engaged in trading in grain "to arrive"; and no effort was made to show any.

Nor is there any relation between the price-fixing restriction and the creation of a market for those having grain to sell at country points in the interval between the close of business on the Board on one day and the opening on the next. That result was due to the practice, in no wise questioned, of sending out bids in the afternoon to country points.

It was due to that practice again, and obviously not to the price-fixing restriction, that sellers of grain at country points were more promptly informed of the prevailing prices in the Chicago market.

The privilege enjoyed by traders under the operation of the "Call Rule" of tendering in fulfillment of their contracts grain arriving at Chicago over *any* railroad instead of over the particular railroad designated by the buyer was due to a new form of contract. (R., 126, 138.) The price-fixing restriction had nothing to do with it.

The claim that the rule enabled the grain merchants of Chicago "to work upon a closer margin of profit" doubtless has reference to the supposed advantage of a fixed price. This is the one exception to the statement that all the benefits claimed for the rule are referable to some other provision than the one under attack. And here, of course, the answer is that however beneficial a fixed price might be according to the point of view of the Board, Congress has proceeded on a different economic theory.

It must be kept in mind, therefore, in reading of the alleged advantages of this rule as set forth in the brief for the Board and in the testimony of the witnesses introduced on its behalf, that in practically every instance the alleged advantage is in no way whatever dependent upon the only provision of the rule which the Government is now attacking, namely, the price-fixing restriction.

III.

THE CONTENTION THAT UNDER THE POWER TO MAKE REGULATIONS FOR THE CONDUCT OF ITS MEMBERS THE BOARD COULD PROHIBIT MEMBERS FROM TRADING AT ALL AFTER A CERTAIN HOUR OR WITH NON-MEMBERS, AND THAT THEREFORE IT COULD DO THAT WHICH IS LESS—PRESCRIBE THE PRICE AT WHICH MEMBERS MAY TRADE AFTER THE GIVEN HOUR OR WITH NON-MEMBERS.

Another defense is, that under the power to make regulations for the conduct of its members the Board could prohibit members from trading at all after a certain hour or with non-members, and that, therefore, it can do that which is less—prescribe the price at which members may trade after the given hour or with non-members. (Appellants' Br., p. 30.)

The proposition that the Board might lawfully have prohibited *all* trading by its members after a certain hour is mere assertion, unsupported either by reason or authority. It suggests a hypothetical case for decision in lieu of the one before the court. The assertion is based, apparently, on the circumstances that "banks prescribe and conform to shorter business hours than other branches of business," that "labor unions combine to shorten hours," that the Chicago Board of Trade itself has for years "maintained a rule confining future trading *in its exchange building or in its vicinity*[1] to less than four hours a day," and on the supposed analogy of various rules shown to be in vogue at other commercial exchanges. (Appellants' Br., 24-25, 30; R. 155, 159-163.)

It may be conceded that the instances cited support by analogy the right of the Board to regulate the duration of its sessions—to restrict trading on the

[1] Italics ours.

exchange within prescribed hours. But the present proposition goes much further. It asserts the right of the Board not only to say when the exchange shall close but to prohibit thereafter any trading whatever by members, whether on the floor of the exchange or elsewhere. This transcends any reasonable regulation of the conduct of members.

Almost without exception the supposedly analogous rules of other exchanges relate to the conduct of members *in and about the exchange halls*—a very different thing from prohibiting members from trading altogether after the closing of the exchange. In the few instances where they might superficially appear to prohibit trading generally after exchange hours it is not clear in the absence from the record of any authoritative exposition of the rules that they really had that effect or were intended to do more than to prohibit public trading by members, after the prescribed hours, in or about the exchange halls.[1]

[1] Thus the rule of the Chicago Board of Trade respecting future trading (R. 155) does not absolutely prohibit such trading outside exchange hours, but merely prohibits future trading in the exchange hall or its vicinity. (*Supra*, p. 17.)

The rule of the New York Cotton Exchange limiting hours of trading has reference on its face to trading "*on the floor of the exchange.*" (R. 160.)

The similar rule of the New York Coffee Exchange prohibits trading after hours "*in exchange or its vicinity.*" (R. 161.)

The rule of the New York Stock Exchange restricting hours of trading (R. 159-160) refers to dealings in the exchange, or publicly in its vicinity. While dealings in stocks "*publicly* outside of the exchange, in any place" are stated to be in contravention of the purpose and intent of the rule, the context would indicate that this is only in the sense that contracts so made are not recognized or enforced by the governing committee of the exchange.

The rule of the Consolidated Stock Exchange of New York prohibiting transactions in any of the securities dealt in on the exchange before or after exchange hours "in the rooms of the association *or elsewhere*" is qualified by the statement that "this is to apply to trading *outside of the railing, in the corridors of the exchange, and on the street in the vicinity of the exchange.*" (R. 161.)

Nor does the proposition that the Board could prohibit altogether trading between members and non-members rest upon any stronger foundation. The case of *Anderson v. United States*, 171 U.S. 604, supports no such proposition. The question there, as stated by the Court, was "whether, without a violation of the Act of Congress, persons who are engaged in the *common business as yard traders* of buying cattle at the Kansas City stock yards * * * may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with *other yard traders* who are not members." (171 U.S. 613-614.) [Italics ours.] Observe that the prohibition was against dealing with "other yard traders," i.e., others "engaged in the common business of buying cattle at the Kansas City stock yards." Giving the case its widest application it carries no suggestion that this exchange could have prohibited altogether trading in cattle between its members and persons who were not members; e. g., could have prohibited its members from buying cattle at country points for shipment to Kansas City. On the contrary, it was expressly stated in the opinion that the rule "has no tendency * * * to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market." (P. 619.)

Even, however, should this Court agree with the hypothetical premise that the Board could have pro-

hibited *all* trading by members after exchange hours, or *all* trading with non-members, it would still not follow that the Board, as a condition of withholding such prohibition, could *prescribe the prices* at which members should buy or sell. In the *Anderson Case*, upon which this branch of the defense rests, the Court laid especial emphasis upon the fact that the rule "has nothing whatever to do * * * with fixing the prices for which the cattle may be purchased or thereafter sold" (p. 614); that "this association does not meddle with prices" (p. 617).

The argument is similar to the one sometimes made that because individuals or corporations might abstain from commerce altogether they are therefore at liberty to say on what terms they will engage in it. Thus in *Thomsen* v. *Cayser*, *supra*, p. 13, 243 U.S. 66, it was urged in behalf of certain steamship lines that because they were volunteers in ocean shipping, free to go or come as they liked, therefore they might have withheld their service except on the illegal conditions they sought to impose. Mr. Justice McKenna answered the contention as follows (87-88):

> This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation, even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law.

IV.

THE CONTENTION THAT THE RESTRICTION OF COMPETITION CAUSED BY THE RULE WAS ONLY INCIDENTAL AND TOO SMALL TO BE TAKEN INTO ACCOUNT.

Again, it is said that the restriction of competition caused by the rule was only incidental and "too small to be taken into account."

There is doubtless a principle of *de minimis* in the Anti-Trust Law as elsewhere; but there is no room for its application here, either in respect to the nature and extent of the restriction imposed or with reference to the volume of commerce on which it operated. The short answer to the contention is that the restriction was not "incidental"; it was direct and deliberate—the defendants "intended to make the very combination and agreement which they in fact did make."[1]

The following statement from the opinion in the *Anderson Case* is relied upon:

> If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, *the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.* (171 U. S., 604, 618-619.) [Italics ours.]

[1] Addyston Pipe Case, 175 U.S. 211, 243.

This language refers to the remoteness of a merely possible effect *which was not intended.* It has no reference either to *intended* restraints or to *volume* of commerce affected.

Moreover, the restriction here, besides being direct and deliberately imposed, was drastic, not slight; it interposed an absolute barrier against free agency in price making at all times when the Board was not in session. The volume of business affected was also substantial. (R. 21.) The record shows that this trade in grain "to arrive" was a sufficiently attractive bone of contention among members of the Board to produce a condition which Vice-President Griffin, a witness for the defendants, described as bordering on "civil war" (R. 143). A branch of interstate commerce which was thus of enough magnitude and importance to call forth a special restraining rule of the Board, the largest grain market in the world, must be deemed of enough importance to call for the application of the countervailing rule of Congress declaring that interstate commerce shall be unrestrained.

Appellants seek to minimize the extent of their restraint on commerce by showing that the schedule of mail trains effective at Chicago interposed a practical limitation on dealings in grain to arrive after about 6 o'clock in the evening, and from this they argue that the restriction due to the rule prevailed only for "about two or three hours at the end of the business day" (Br., p. 9). A restraint of trade during part of the business day can not be justified, however,

by leaving it free during the remaining part. The law intends that it shall be free at all times.

In any event, however, the contention has no foundation in fact. The record shows that bids were sent to the country by telegraph and telephone as well as by mail. (R. 91, 114, 117.) These instrumentalities were available at all hours and it does not appear that they were on the whole used less than the postal facilities. The witness Hubbard, in extolling the advantages of the "Call Rule," testified that its effect in his business was to establish a market on commercial grades of grain *for practically the twenty-four hours of the day* (R. 123).

V.

THE CONTENTION THAT INTERSTATE COMMERCE IS NOT INVOLVED.

It is also urged that the decree should be reversed on the ground that the subject-matter upon which it operates is purely *intrastate* commerce because the contracts made for the purchase or sale of grain "to arrive" do not in terms *require* the grain to be shipped in interstate commerce. It is said that in order "to make the transaction of sale interstate, the parties should contemplate, and their contract should require, the shipment of property from one State to another." (Appellant's Br., 31-33.)

The answer is twofold.

First. The transactions pursuant to the "Call Rule" actually were in large measure of interstate

character. Bids were sent out broadcast to persons outside of Illinois who were the owners and shippers of grain located in States other than Illinois, offering to purchase their grain "to arrive" at Chicago. The parties to the resulting contracts did contemplate the shipment of property from one State to another, and property was actually so shipped in the performance of the contracts. Therefore interstate commerce was directly involved as the subject-matter of this suit and the appellant's contention has no basis in fact.

Second. It makes no difference, however, whether particular contracts made pursuant to the "Call Rule" were or were not interstate transactions. Regardless of the character of the transactions, the "Call Rule" and the concerted action under it directly restrained an actual current of interstate commerce consisting of the grain moving from States other than Illinois to the Chicago market by precluding members of the Board of Trade from competing with each other in the purchase of such grain after exchange hours. *Loewe* v. *Lawlor*, 208 U.S. 274; *Temple Iron Co.* v. *United States* (*United States* v. *Reading Company*), 226 U.S. 324, 357-358.

The case is like *United States* v. *Patten* (*Cotton Corner Case*), 226 U.S. 525, 543-544, where a conspiracy to run a "corner" in cotton was held to be an unlawful restraint on the whole volume of interstate commerce in that commodity even though the restraining acts were not altogether, if at all, interstate transactions.

Ware & Leland v. *Mobile County*, 209 U.S. 405, and *Engel* v. *O'Malley*, 219 U.S. 128, are not in point. In the *Ware & Leland Case* the defendants were brokers who took orders in Alabama, and transmitted them by telegraph to points outside the State, for the purchase and sale of cotton on speculation. The contracts so negotiated did not require, nor did they ordinarily entail, the shipment of any cotton in interstate commerce, and it was accordingly held that the imposition of a license tax on the business of making the contracts did not obstruct or interfere with interstate commerce. In *Engel* v. *O'Malley* the contention was that the exaction of the license tax amounted to a restraint on the interstate transmission of funds. The Court held otherwise because the law "was passed for the purpose of regulating and safeguarding *the business of receiving deposits*, which precedes and is not to be confounded with the later transmission of money, although leading to it." (Mr. Justice Holmes, p. 139. Italics ours.)

Both cases go merely to the question whether certain state tax laws burdened or directly affected interstate commerce. It does not follow that a given transaction is outside the body of interstate commerce because the State taxing power may be permitted to operate upon it. As said in the *Swift Case*, 196 U.S. 375, 399-400:

> But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but

depends upon whether the tax so far affects that commerce as to amount to a regulation of it. * * * But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.

VI.

CONCERNING THE SCOPE OF THE DECREE.

Lastly, the claim is made that the decree[1] is too broad, first, because certain of its injunctive provisions are not in terms restricted in their operation to interstate commerce (Appellant's Br., 33), and second, because it "enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question." (Ibid., 6, 38-39.)

The first proposition is addressed specifically to paragraph 1, sub-paragraphs (a), (b) and (c). If

[1] The decree, paragraph 1, finds that the Board of Trade of the City of Chicago, its officers and directors, "by adopting, acting upon and enforcing" the Call rule became parties to a combination and conspiracy to restrain interstate trade and commerce in violation of the Sherman Law. It permanently enjoins the Board, its members, officers and directors named in the petition and their successors in office, agents, etc., "from carrying out or attempting to carry out the aforesaid combination or conspiracy, and from entering into any other like combination or conspiracy among themselves or one with another to restrain interstate or foreign trade or commerce in the articles corn, oats, wheat and rye or any of them, by means or devices similar to those herein specifically enjoined," and each and all are "permanently enjoined and restrained—

(*a*) From agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of maintaining a limited price or any price for the articles corn, oats, wheat and rye or any of them, which may be arrived at by virtue of a certain 'Call' rule [setting forth the rule].

(*b*) From enforcing, acting upon or hereafter adopting any similar rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of fixing or maintaining a price on the articles corn, oats, wheat or rye for any specified time or times.

(*c*) From enforcing, acting upon or hereafter adopting any rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, to the effect that members of said Board of Trade of the City of Chicago shall fix offers or bids which may be made to dealers in the articles corn, oats, wheat or rye to arrive, which said offers or bids are to be made between the regular sessions of said Board of Trade of the City of Chicago." (R. 165-167.)

these were isolated from the language immediately preceding, there would be some merit in the contention that according to their terms they apply as well to intrastate as to interstate commerce. Taking the entire context, however, it is clear that the provisions have reference only to the latter. This objection, moreover, is raised now for the first time. It was not assigned as error.

On the proposition that the decree enjoins "future acts * * * in no way similar to the rule in question," it is enough to say that the decree, as appears on its face, merely enjoins the continuance of the combination found to exist, or any similar one, either by means of the "Call Rule" or by any like rule or device. This much was necessary to prevent the recurrence of the evil which the case disclosed. *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 308; *Swift & Company* v. *United States*, 196 U.S. 375, 400. It was said in the *Swift Case*, "Under the [Sherman] act it is the duty of the court, when applied to, to stop the

[unlawful] conduct" (p. 400). That is all the decree in this case did when it enjoined the defendants from entering into any agreement for the purpose or with the effect of "fixing or maintaining a price on the articles corn, oats, wheat or rye, for any specified time or times."

CONCLUSION.

The decree of the District Court should be affirmed.

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